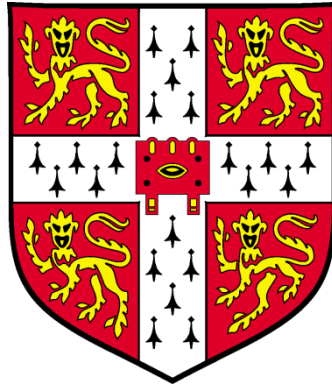


**DIRECT ENFORCEMENT ON THE HIGH SEAS:
THE STRATEGY OF THE SEA SHEPHERD
CONSERVATION SOCIETY**



**This dissertation is submitted for the degree of
Doctor of Philosophy in Politics and International Studies**

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SUMMARY

This study examines the anti-whaling strategy of the Sea Shepherd Conservation Society (SSCS). Despite being relatively small and resource poor, this confrontational marine conservation organization has been successful in frustrating Japanese whaling in the Southern Ocean through the use of what it describes as ‘aggressive non-violent direct action.’ Adopting an inductive approach, the study uses participant observation and process tracing in order to uncover those mechanisms which make the SSCS strategy effective. In understanding this strategy, which is unlike any other described in the transnational environmental activism literature, the study seeks to add to our understanding of the role and power of non-state actors in international affairs.

A close examination reveals that the organization is engaging in a strategy which can be described as ‘direct enforcement’ (DE) – whereby it seeks to enforce existing marine conservation laws. The SSCS supports its claims as an enforcement organization through the use of legal language, symbols and imagery. It also selects targets which can be accused of violating the law, and gathers evidence to support these accusations. Once it has identified such a target, the SSCS interferes with the operations and attempts to prevent illegal and environmentally harmful activities, and to directly increase the target’s costs of operation.

This study explores some of the mechanisms upon which DE relies. Aggressive intervention exposes activists to potential retaliation from targets and states. Several mechanisms reduce potential retaliation. First, activists are protected by the principle of unclean hands: targets do not wish to draw attention to their own wrongdoings by indicting activists. Second, activists surround themselves and their actions in a complex web of international laws, which tends to deter state prosecution, because states generally wish to avoid complications or potentially embarrassing international incidents.

By actively enforcing laws where states lack capacity and/or political will to do so, DE enhances the compliance pull of international laws. Through the use of DE, activists also exert powerful legal leverage against states. Eschewing traditional activist approaches such as the ‘mobilization of shame,’ DE not only criticizes states for their failure to live up to their international obligations and commitments, but supports these claims with confrontational actions which cannot be ignored.

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LIST OF ABBREVIATIONS AND ACRONYMS USED

AAT – Australian Antarctic Territory

AFP – Australian Federal Police

AT – Antarctic Treaty

ATS – Antarctic Treaty System

AWS – Australian Whale Sanctuary

BFT – Bluefin Tuna

CBD – Convention on Biological Diversity

CCAMLR – Convention on the Conservation of Antarctic Marine Living Resources

CCAS – Convention for the Conservation of Antarctic Seals

CD – Civil Disobedience

CFP – Common Fisheries Policy (EU)

CITES – Convention on International Trade in Endangered Species of Wild Fauna and Flora

CONAPESCA – Comisión Nacional de Acuacultura y Pesca

DA – Direct Action

DE – Direct Enforcement

EEZ – Exclusive Economic Zone

EF! – Earth First!

ELF – Earth Liberation Front

ENGO – Environmental Non-governmental Organization

EPBC – Environment Protection and Biodiversity Conservation Act (Australia)

ETAG – Environmental Transnational Advocacy Grouping

FA – Fisheries Agency (Government of Japan)

FoE – Friends of the Earth

FSC – Forest Stewardship Council

GRT – Gross Register Tonnage

HSI – Humane Society International

ICCAT – International Commission for the Conservation of Atlantic Tunas

ICJ – International Court of Justice

ICR – Institute of Cetacean Research

ICRW – International Convention for the Regulation of Whaling

IENGO – International Environmental Non-governmental Organization

IFAW – International Fund for Animal Welfare

INGO – International Non-governmental Organization

INTERPOL – International Criminal Police Organization

IO – Intergovernmental Organization

IR – International Relations

IRPCS/COLREGs – International Regulations for the Prevention of Collisions at Sea

IUCN – International Union for Conservation of Nature

IUU – Illegal, Unreported, and Unregulated (Fishing)

IWC – International Whaling Commission

JARPA (II) - Japanese Research Whaling Program in the Antarctic (II)

JWA – Japan Whaling Association

Kyodo - Kyodo Senpaku Kaisha Ltd. (Japanese whaling company)

MAFF – Ministry of Agriculture, Forestry and Fisheries (Government of Japan)

MARPOL – International Convention for the Prevention of Pollution from Ships

MAW – Mendocino Abalone Watch

NAMMCO – North Atlantic Marine Mammal Commission

NGO – Non-governmental Organization

NSA – Non-state actor

NVDA – Non-violent Direct Action

PO – Participant Observation

RIB – Rigid Inflatable Boat

RMP – Revised Management Procedure

SM#2 – *Shonan Maru No. 2* (Japanese Security Vessel)

SOWS – Southern Ocean Whale Sanctuary

SSCS – Sea Shepherd Conservation Society

SUA – Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

TAG – Transnational Advocacy Grouping

TAN – Transnational Advocacy Network

TBF – The Black Fish
TCS – Transnational Civil Society
TNC – Transnational Corporation
UAV – Unmanned Aerial Vehicle
UK – United Kingdom
UNCLOS – United Nations Convention on the Law of the Seas
US – United States
USD – United States Dollars
USSR – Union of Soviet Socialist Republics
WCN – World Charter for Nature (United Nations)
WWF – World Wide Fund For Nature (formerly World Wildlife Fund)
YM#1 – Yushin Maru #1 (Japanese Harpoon Vessel)
YM#2 – Yushin Maru #1 (Japanese Harpoon Vessel)
YM#3 – Yushin Maru #1 (Japanese Harpoon Vessel)

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CHAPTER 1 – INTRODUCTION

1.1 - Action in the Southern Ocean

February 4, 2011, the Southern Ocean, Antarctica: dodging the spray from water cannons, two high-speed rigid inflatable boats (RIBs) from the Sea Shepherd Conservation Society's (SSCS) vessel the *Bob Barker* and the SSCS's hydrodynamic *Gojira* converged on the *Yushin Maru #3* (YM#3). This harpoon vessel was part of the Japanese whaling fleet ostensibly conducting 'research' whaling in the Southern Ocean, one of the most remote and inhospitable environments on the globe. The small marine conservation vessels engaged the YM#3, hooking long trailing lines amidships the whaling vessel. Smoke flares were thrown into the defensive nets of the whaling ship. At the same time SSCS crew members from the *Gojira* launched paint and stink bombs at the whaling vessel, as their vessel zigzagged across the bow of the YM#3. At 16:54, the whaling vessel ground to a halt, the victim of a successful prop-fouling by the SSCS.¹

1.2 - The Sea Shepherd Conservation Society

The action described above was part of a multi-year SSCS campaign, which has been ongoing since 2005, aiming at stopping Japanese 'research' whaling in the Southern Ocean. The SSCS interferes with the hunt, actively preventing whaling from occurring by blockading the fleet's factory ship, fouling propellers and by pursuing a host of other confrontational tactics. This approach appears to have been successful: prior to interventions by the SSCS, the Japanese consistently met and exceeded their self-allotted quotas of minke and fin whales. However, following the intervention of the SSCS, the Japanese have seen their catches decline, to the extent that in the 2010-2011 whaling season the whalers landed only 19% of their quota, and were forced to end their season early "due to repeated harassment from activists at sea."²

¹ This action was described by Alex Cornelissen, captain of the *Bob Barker*, as the turning point of 'Operation No Compromise', Field Journal, February 26, 2011; see also Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

² See for example Sky News, "Japan Announces End to Whaling Season," February 18, 2011, available at <http://www.skynews.com.au/businessnews/article.aspx?id=579284> (accessed April 20, 2011); ABC News, "Sea Shepherd Declares Japan Whaling Victory," 10 March 2012, available at <http://www.abc.net.au/news/2012-03-10/sea-shepherd-declares-japan-whaling-victory/3881288> (accessed April 20, 2011); Brown 2012.

In addition to having a quantifiable impact on Japanese whaling, SSCS campaigns also appear to have had a broader impact on the whaling issue in general. SSCS actions have brought international attention to an issue which had slipped from the public spotlight, and it seems to have had an impact on the actions of states. Prior to SSCS campaigns, the Australian government had done virtually nothing to oppose Japanese whaling, a large portion of which takes place in the exclusive economic zone (EEZ) of the Australian Antarctic Territory (AAT). However this changed following several international incidents precipitated by the SSCS and subsequent media focus, which appears to have been influential in the Australian government's decision to institute proceedings against Japan in the International Court of Justice (ICJ) in 2010.³

The SSCS's approach also seems to have found a way around the rhetorical deadlock which has plagued the whaling issue in the recent decades. A transnational advocacy campaign, comprised of large and small international and domestic anti-whaling groups and organizations – such as Greenpeace, Project Jonah, the American Cetacean Society, the World Wide Fund for Nature (WWF⁴), the Sierra Club and others – was at first very successful in propagating and disseminating a global anti-whaling norm. Using conventional Transnational Advocacy Grouping (TAG) strategies such as awareness raising, information politics and lobbying, their campaign convinced “the vast majority of the industrialized world ... that people should not kill whales.”⁵ The transnational campaign against whaling was instrumental in the International Whaling Commission (IWC) implementing a global moratorium on whaling in 1986. However, the campaign seems to have reached the limits of conventional TAG strategies. Some argue that additional actions at this stage may in fact strengthen anti-whaling sentiment in the few states, such as Iceland, Japan and Norway, where whaling persists.⁶ The IWC itself is paralyzed, unable to enforce its own decisions and often unable to come to agreement due to polarization between pro- and anti-whaling camps. The SSCS appears to have made headway circumventing this standoff through the use of legal rhetoric.

³ Rothwell 2010:4; see also Herald Sun (Australia), “Australia Fights Japan’s Whaling in International Court,” May 9, 2011, available at <http://www.heraldsun.com.au/news/breaking-news/australia-fights-japans-whaling-in-international-court/story-e6frf7jx-1226052325625> (accessed May 9, 2011); BBC News, “Australia to Mount Legal Bid Against Japan Whaling,” May 28, 2010, available at <http://www.bbc.co.uk/news/10179360> (accessed May 9, 2011).

⁴ Formerly the World Wildlife Fund (and still in North America).

⁵ Strausz 2007; Blok 2008; Hirata 2004.

⁶ Bailey 2008:302-303; Andresen and Skodvin 2008:121, 142-3; van Ginkel 2005:87-88; Kalland 1993b:3.

The SSCS actions and their apparent success are intriguing, and stand out as an example of the power that non-state actors (NSAs) can wield in international relations (IR). The action described at the beginning of this chapter was confrontational and highly unconventional. By examining the strategy of this organization, we may be able to expand our understanding of the ways in which NSAs, such as the SSCS, can and do exert power in international affairs.

1.3 - Non-State Actors in International Relations

The field of IR has been dominated by the realist tradition, and has focused on the state as the primary unit of analysis, but this age of IR has passed. The international system is now seen as a complex web of actors and networks, and while states' power remains preeminent, it is increasingly being challenged and influenced by NSAs. The term 'non-state actor' is a negative term, describing that which it is not, and refers to all "actors that are not (representatives of) states, yet that operate at the international level and are potentially relevant to international relations."⁷ The term captures a diverse range of actors which can be divided into the following categories: 1) Intergovernmental organizations (IOs)⁸; 2) International Non-Governmental Organizations (INGOs) and Transnational Advocacy Groupings/Networks (TAGs/TANs); 3) Corporate Interest Groups and Transnational Corporations (TNCs); Epistemic Communities; and 4) a remaining category comprising of religious institutions, terrorist networks and organized crime syndicates (dark networks), sub-state agencies, social movements, liberation movements, professional organizations and others.⁹ Each of these actors employs a range of strategies in pursuit of a variety of outcomes in the international arena. Understanding these strategies is becoming increasingly important as NSAs grow in number and influence around the globe.

Early scholarship sought to determine whether NSAs actually matter in IR, challenging the realist state-centric hegemony. Claims that IR should remain solely focused on the state appear increasingly antiquated, demonstrated by countless examples of NSAs having (sometimes dramatic) influences on IR. If NSAs matter, the remaining questions are 'how' and 'how much'

⁷ Arts 2005:181; see also Arts 2001.

⁸ Arts notes that not all scholars consider IGOs to be NSAs, as "some consider an IGO simply as an ensemble of states, thus being a *state* actor, others believe that IGOs exhibit at least some degree of autonomy and authority vis-à-vis states, thus constituting a *non-state* actor" (2005:181).

⁹ See for example Arts 2005:181; Arts 2003-2004:3, 5; Betsill and Corell 2001:66.

do they matter? By far the more pertinent of these two questions and the guiding question of this study is the 'how': How do NSAs exert influence and power in international affairs? The question of measuring the influence of various NSAs is important, however, such measurements provide scant insight into the mechanisms through which NSAs actually exert power. Here I use Tilly and Tarrow's definition of a mechanism to mean "a delimited class of events that alter relations among specified sets of elements in identical or closely similar ways over a variety of situations."¹⁰ It is the goal of this study to provide understandings of previously unexamined mechanisms in order to contribute to a growing understanding of the various strategies employed by NSAs. Towards this end, the study uses an inductive approach focusing on a single case, that of an entity employing a strategy which does not appear to fit into any of the existing typologies of NSA strategies.

This study specifically seeks to further our understanding of the strategies employed by environmentally motivated INGOs and TAGs (IENGOS/ETAGs), and the mechanisms upon which they rely. In so doing, this study seeks to contribute to the improvement and refinement of these strategies, with the ultimate aim of increasing the effectiveness of IENGOS/ETAGs. This is what Bevington and Dixon describe as movement-relevant theory, the idea that the theory developed by the study will be relevant to, read by, and ultimately provide some benefit to the movement itself.¹¹

The focus on IENGOS/ETAGs is motivated by several factors. First, I am an environmentalist. I believe that environmental issues number amongst the most important of our age and it is my desire that this work contribute to improving the effectiveness of environmental activism. Environmental activists must engage in a high level of tactical and strategic innovation in order to overcome the many challenges they face. The study of IENGOS/ETAG strategy can potentially reveal new and innovative ways by which INGOs/TAGs seek to exert influence in IR. The focus on radical elements within the broader environmental movement is also purposeful, stemming from a belief that 'innovation occurs on the margins,'¹² making the strategies of radical groups a ripe area to search for new strategic solutions to old problems.

¹⁰ Tilly and Tarrow 2007:29. The use of this definition in no way seeks to limit the findings of this study, or constrain these findings within a particular segment of literature.

¹¹ Bevington and Dixon 2005.

¹² Chenoweth and Stephan 2011:55, citing Schock 2005:144.

1.4 - The Puzzle of the SSCS

The SSCS and the approach it has taken to protect marine species, presents an intriguing puzzle. Here is an organization whose strategy belies conventional understandings and explanations of INGOs/TAGs. SSCS is a relatively resource poor IENGO employing confrontational and unconventional tactics and yet is apparently extremely successful at what it does. The SSCS's annual campaign against Japanese 'research' whaling in Antarctica has been very successful, so much so that even its targets have credited it with being effective.¹³ The SSCS has managed to achieve dramatic outcomes on the whaling issue where more conventional INGOs/TAGs have failed. The organization styles itself as an international conservation law enforcement organization, and claims to use "aggressive non-violent direct action" in order to enforce international conservation.¹⁴ This type of framing is foreign to how most INGOs/TAGs frame themselves and their actions. As we shall see, most environmental activists rely on moral authority, disseminating norms and upon appealing to values. They truck in symbols and information, engaging in what Keck and Sikkink describe as 'advocacy' – the act of organizing to "promote causes, principled ideas and norms."¹⁵ Keck and Sikkink elaborate, suggesting that because INGOs/TAGs "are not powerful in the traditional sense of the word, they must use the power of their information, ideas and strategies to alter the information and value context within which states make policies."¹⁶ The SSCS's confrontational approach does not appear to rely on information, ideas or values in the same way. Nor does it appear to only seek "to create, strengthen, implement, and monitor international norms," which Khagram, Riker and Sikkink describe as the primary goals of transnational advocacy.¹⁷ The strategies used by the SSCS are more confrontational and aggressive than other INGO/TAG approaches.

The organization's apparently successful application of its unconventional approach is at odds with theories within the literature which explore the strategies of INGOs/TAGs in IR, and the relative effectiveness of those strategies. The SSCS's apparent success indicates a gap in the

¹³ ICR, SC/63/O1 (2010-2011); ICR, "JARPA II Research Vessels to Return Home," media release, May 6, 2011, available at <http://www.icrwhale.org/pdf/110218ReleaseENG.pdf> (accessed September 17, 2013).

¹⁴ See *inter alia* Watson quoted in Stuart et al. 2013:9; Watson 2003:107; DeLuca 1999:74; Watson 1994:210; Field Journal, Peter Hammarstedt, first mate on the *Bob Barker*, February 23, 2011.

¹⁵ Keck and Sikkink 1999:91; and see Keck and Sikkink 1998:8-9.

¹⁶ *Ibid*, 1999:95.

¹⁷ Khagram, Riker and Sikkink 2002:4.

literature's understanding of how NSAs in general, and IENGOS/ETAGs specifically, achieve results internationally. As a result, the SSCS serves as a prime case study to further our understanding of the strategies employed by INGOs/TAGs in IR.

This then leads to the principal research question of this study: What is the anti-whaling strategy of the SSCS, and what makes this strategy effective? Significantly, the study does not aim to be idiographic. While the question guiding the case-specific inquiry of this study relates to a single organization/phenomenon, the conclusions drawn are intended to have broader implications. The goal of the investigation is not to uncover some idiosyncratic strategy particular to the SSCS and its anti-whaling campaign, from this single case, but rather to theorize new strategic possibilities for NSAs in IR, using the single case study of the SSCS as a starting point to broaden our general understanding of INGO/TAG strategy. The research question does not necessarily suggest that the SSCS is completely aware of that which makes its strategy effective, leaving open the possibility that some of the mechanisms which make SSCS strategy effective are not consciously enacted by the organization.

The principal research question focuses on the SSCS's anti-whaling strategy. The organization campaigns on a variety of issues, and like most INGOs/TAGs, employs a range of strategies, many of which are relatively conventional. The Antarctic anti-whaling campaign has been selected in so far as it typifies the SSCS's confrontational strategy and is one well suited as a single case study. When 'SSCS strategy' is referred to throughout the study, it refers specifically to the SSCS's Antarctic anti-whaling campaign, unless otherwise specified.

Other questions which extend from this principal question will be addressed over the course of this study. One of the assumptions which extends from the principal question is that SSCS strategy is somehow different from typical INGO/TAG strategies, or that it serves as a particularly salient example of a strategy employed by INGOs/TAGs but which is not currently describe in the literature. This begs the questions of what are typical INGO/TAG strategies? And what does the current scholarship say about the range of strategies which INGOs/TAGs are thought to employ? An examination of the current mainstream literature on INGO/TAG strategies reveals that the SSCS anti-whaling strategy is not currently described by this literature. The SSCS strategy even challenges classification with unconventional direct action (DA) employed by domestic actors.

This study adopts an inductive and qualitative approach in order to address these questions. Participant observation (PO), conducted during the 2010-2011 SSCS Antarctic anti-whaling campaign ('Operation No Compromise'), was used to gain firsthand experience of SSCS strategy in action. Primary data collection was imperative due to the paucity of reliable information concerning SSCS strategy and conflicting accounts from limited academic examinations of SSCS strategy. PO was specifically selected due to the weakness of employing other methods (such as interviews or surveys) to study an organization like the SSCS. The rich data gathered through PO was then used to fuel process tracing, which was employed to systematically describe and identify the causal mechanisms driving SSCS strategy. This data was triangulated, where possible, with news media reports, reports by the Institute of Cetacean Research (ICR), and was supplemented with semi-formal interviews with SSCS crew members conducted during and after 'Operation No Compromise,' and with officials and observations made during the 2011 meeting of the IWC.

A final question designed to rule out the discovery of idiosyncratic strategies can be formulated as: Is the SSCS's strategy tailored specifically to this organization, or can this strategy be employed by other organizations? In order to answer this question I first considered whether the organization employs a similar strategy in its other campaigns. This served to establish that its confrontational strategy is not dependent on any characteristics specific to this campaign, and therefore that the strategy is sufficiently flexible to accommodate a range of issues. Here the SSCS's bluefin tuna campaign is suitable to the exploration of this point. Then, having isolated the mechanisms upon which the SSCS anti-whaling strategy relies, I then undertook a survey of other (I)NGOs/TAGs across a range of issues and theatres to identify whether they relied on similar mechanisms. This survey revealed that there are in fact many other (I)NGOs/TAGs which are employing a strategy similar to that of the SSCS, establishing that the findings of this study are generalizable.

1.5 - Review of Sea Shepherd Literature

1.5.1 - Academic Sources

An examination of the existing literature concerning the SSCS serves to elaborate on the current understandings of the organization and its strategy, which in turn demonstrates the need for primary data collection and an inductive approach. Explorations of SSCS strategy within academic literature are rare, and discussions of the SSCS are typically factual and often incidental. The SSCS is mentioned in academic sources examining such issues as: the revival of the Makah whale hunt in Alaska,¹⁸ Japanese dolphin hunting in coastal waters,¹⁹ commercial fishing,²⁰ naval terrorism and violence,²¹ trade and IR,²² anti-sealing campaigns²³ and animal rights activity.²⁴ The SSCS is discussed in academic works concerning the broader radical environmental movement,²⁵ although of note here is that SSCS actions are included with those of land-based groups.²⁶ The SSCS is also often mentioned in works which discuss Greenpeace,²⁷ and in those more broadly exploring the anti-whaling movement and the role of NGOs and the IWC.²⁸ These sources provide relevant facts and help to place the SSCS in the wider environmental movement, and specifically the anti-whaling campaign; however discussions of the SSCS tend to lack depth and are often tangential.

At the outset of this study there were very few academic sources which focused on the SSCS. Most of the academic literature specifically has emerged over the course of this study, including several legal articles.²⁹ Roeschke's study was the first to explore the question of whether the SSCS can legally enforce international law, as it claims to so do.³⁰ His affirmative

¹⁸ van Ginkel 2007; Vivanco 2003; Sullivan 2000; Erikson 1999.

¹⁹ Schmidt 2000.

²⁰ Lassiter 2000; Jenkins 1993-1994.

²¹ Menefee 1993; Jenkins 1983.

²² Epstein and Barclay 2013; Walton 2010; Sullivan 2007.

²³ Barry 2005; Wenzel 1991.

²⁴ Emel and Wolch 1998.

²⁵ Scarce 2006; Arnold 1997:57-59; List 1993; Manes 1990.

²⁶ See for example Correll 1992-1993:781-784.

²⁷ See *inter alia* Zelko 2013; Hunter and Weyler 1978.

²⁸ See *inter alia* Sakaguchi 2013; Darby 2007; Day 1987; Watanabe 1980:79.

²⁹ See Brown 2012; Moffa 2012; Anton 2010a; Caprari 2010; Hoek 2010; Kanehara 2009; Roeschke 2009; Nagtzaam and Lentini 2008.

³⁰ Roeschke 2009.

conclusion was later contested by both Brown and Anton.³¹ Both Caprari and Hoek explore the legality of SSCS actions.³² Ryan examines the Bethune trial, looking at the details of the case surrounding the arrest of SSCS activist Pete Bethune after he boarded a Japanese whaling vessel in an attempt to make a citizen's arrest of its captain in 2010 (see Bethune-*Ady Gil* Incident, Chapter 5.3.3.3).³³ Ryan also compares legal strategies employed by the SSCS in the defense of Bethune, with Greenpeace's legal defense of the Tokyo Two, two Greenpeace activists who were arrested in 2008 for stealing whale meat during an investigation which they were conducting into embezzling in the whaling industry. Ryan finds that the SSCS defence of Bethune was 'restrained' and 'ambivalent,' and more concerned with getting Bethune out of Japan, as compared to Greenpeace's 'purposive' defence of the Tokyo Two, which sought to use the court case as an extension of their campaign.³⁴ Kanehara outlines some of the other legal actions taken by the Japanese against the SSCS, and Nucci specifically focuses on the 2012 Japanese injunction against the SSCS in the United States (US) 9th District Court.³⁵ These arguments will be addressed in greater detail when I consider the legality of SSCS actions and claims (see Legality of SSCS Actions, Chapter 5.3.2.5). Generally speaking, these sources are principally concerned with the legality of SSCS tactics rather than the strategy of the SSCS.

In the field of sociology Stuart et al. use interviews with SSCS crew members to explore identity creation amongst SSCS activists. This is one of the few studies which relies on primary data collection and upon interviews with SSCS members other than Paul Watson, the founder and head of the SSCS, and captain of the *Steve Irwin* during 'Operation No Compromise.'³⁶ In the realm of security studies, Nagtzaam and Lentini argue that the SSCS constitutes a gray area phenomenon, that it cannot accurately be classified as "piracy, vigilantism, terrorism, as well as (self-ascriptively) enforcing environmental law."³⁷ They point out that the SSCS sits in a 'blind spot' in the literature, but they do not develop their conclusion that the SSCS constitutes "a new type of vigilante group," which may broaden our understanding of conventional vigilantism.³⁸

³¹ Brown 2012; Anton 2010a.

³² Caprari 2010; Hoek 2010.

³³ For more details on the Bethune incident, see Bethune-*Ady Gil* Incident see Chapter 5.3.3.3; Bethune 2010; Ryan 2010.

³⁴ Ryan 2010; and Ryan 2011; Ryan 2009.

³⁵ Nucci 2013; Kanehara 2009.

³⁶ Stuart et al. 2013.

³⁷ Nagtzaam and Lentini 2008:112.

³⁸ *Ibid*, p.129.

Media scholars have shown an increased interest in the SSCS. Lester looks at how the SSCS creates image events and how it manages its media strategy. Lester's argument that the SSCS is dependent on news media coverage, and that their media strategy is "unlikely to provide sustained news access" seems at odds with the fact that the organization has been the subject of an ongoing, prime-time docu-drama, *Whale Wars*.³⁹ McHendry looks at this program, and through this analysis discusses how image events are treated as commodities.⁴⁰ These sources tend to treat the SSCS's actions as image events, and the SSCS strategy is described as relying primarily on symbolic politics, a suggestion which appears at odds with the organization's insistence on achieving direct outcomes.

Several whaling-related sources describe the SSCS as fulfilling an *ad hoc* enforcement mechanism for the IWC, in absence of any official mechanisms.⁴¹ Others describe the impact of SSCS actions on the public of target states. Bailey argues that SSCS actions do not have any resonance in pro-whaling countries such as Norway, and that these actions do more harm than good to the image of the anti-whaling movement in pro-whaling countries.⁴² Morikawa describes how SSCS actions have led to similar backlash in Japan, possibly leading to a strengthening of pro-whaling sentiment.⁴³

One of the few scholars who has examined SSCS strategy in any detail is Plant. In his first look at the issue of maritime activism and legal issues involving the interference of vessels at sea, Plant focuses on Greenpeace, dismissing the SSCS, noting that "their methods of protest are clearly illegal under international law," and excessive.⁴⁴ In a return to the issue, Plant explores maritime DA in greater detail, drawing a distinction between 'symbolic protest' and 'direct action protests' which involves "protesters actively seeking to prevent, or at least to delay, conduct of the activities being protested against."⁴⁵ Plant examines some of the legal mechanisms which give power to acts of DA on the high seas, and specifically looks at the 'human shield' tactics of Greenpeace, whereby activists seek "to induce or impel the target ship to halt or modify her activities, not out of fear for herself, but out of that of harming the

³⁹ Lester 2011.

⁴⁰ McHendry 2012; see also Besel and Besel 2010.

⁴¹ Jefferies 2009; Freeland and Drysdale 2005:14-15; MacLeod 1994:102-103; van Drimmelen 1991:241.

⁴² Bailey 2008:312.

⁴³ Morikawa 2009.

⁴⁴ Plant 1983.

⁴⁵ Plant 2002:76-77.

protesters.”⁴⁶ While Plant repeats SSCS claims to enforce international environmental law, he purposefully excludes all actions which involve ‘the use of force,’ noting only that actions such as SSCS efforts to disable vessels with prop-foulers cannot be “regarded as true ‘human shield’ tactics.”⁴⁷ In essence, the aspects of SSCS strategy explored by Plant are those which bear a resemblance to those of Greenpeace. He purposefully excludes the more confrontational and aggressive actions of the SSCS, which are the focus of this study.

Another evaluation of SSCS strategy suggests that it constitutes a form of militant symbolic politics. Here such scholars as Besel and Besel, and Corell argue that the confrontation inherent in SSCS actions is solely designed to attract media attention.⁴⁸ Mills and Ernst characterize SSCS strategy as “a means of influencing public opinion; opinion that they believe will influence government actors and ultimately defeat the Japanese whalers.”⁴⁹ They draw this conclusion based on their findings that “[f]rom a conventional military perspective Sea Shepherd’s tactics have proven ineffective, as they have failed to curtail whaling.”⁵⁰ This conclusion is based on the belief that “the number of whales taken by the Japanese has increased since Sea Shepherd began its Southern Ocean campaign.”⁵¹ Unfortunately the conclusion is drawn from a misinterpretation of the data. From 2005 to 2008, the number of whales landed by the Japanese was greater than previous years, however this can be attributed to the fact that after 2005 the Japanese implemented a second phase to their ‘research’ whaling, where the annual quotas were double those of previous years. When one considers the percentage of the quota attained by the Japanese, the true impact of SSCS actions is immediately evident. Prior to 2006 the Japanese consistently harvested their complete quota (+/- 10%, and typically closer to 110%), but after 2006 this number dropped dramatically, so much so that in 2011, they attained only 19% of their quota (see Table 1, Chapter 5).

Another view of SSCS strategy suggests that it seeks to orchestrate international incidents in order to put diplomatic pressure on states. Burbach argues that “Sea Shepherd clearly hopes to use incidents to force the Australian government to choose between being seen actively assisting whalers or anti-whaling NGOs,” and that given current polls, siding with the whalers would be a

⁴⁶ *Ibid*, p.97-98.

⁴⁷ *Ibid*, p.100.

⁴⁸ Besel and Besel 2010:171; Corell 1992-1993:776; and see Mills and Ernst 2012:211.

⁴⁹ Mills and Ernst 2012:207.

⁵⁰ *Ibid*, p.209.

⁵¹ *Ibid*, p.210.

very unpopular move by the Australian government.⁵² The idea is that SSCS actions create a ‘crisis point’ forcing the issue of whaling onto the agenda.⁵³ This idea has some merit, but I found that it does not appear to be the central component of SSCS strategy (see Chapter 5.3).

Jabour and Iliff distinguish SSCS strategy, which they classify as ‘innovative direct action’, from the non-violent DA and bearing witness of Greenpeace. They observe that the actions of the SSCS “undoubtedly put undue and unwelcome pressure on diplomatic negotiations between the governments concerned.”⁵⁴ They conclude however that SSCS efforts have “damaged its own credibility and Australia's initially linking itself to the NGO potentially undermined both its own credibility (internationally) and its popular anti-whaling policy (domestically).”⁵⁵ Jabour and Iliff claim that the only positive outcome of the confrontations in the Southern Ocean “has been an increasing respect for Greenpeace for showing restraint, and the saving of a few whales...”⁵⁶

Mégret explores the use of civil disobedience (CD) in IR and the standing of CD under international law. Mégret situates CD in a “broader tradition of non-violent resistance” in which the opposition to unjust laws is fundamental.⁵⁷ He notes that there are few “international legal cases hearing truly international law defences,” and that typically domestic groups use the authority of international law to justify violating domestic law, appealing to international law as a ‘higher law.’⁵⁸ Mégret suggests that when the SSCS claims that the Japanese are in violation of the ‘international whaling regime’ as justification for obstructing whaling, it is a possible example of an international legal case with an international legal defence. For this reason Mégret describes the SSCS as “a sort of ‘international law’ *avant garde*.”⁵⁹ This again suggests that the SSCS is doing something different, however characterizing SSCS actions as CD is problematic. The violation of an unjust law does not appear to be part of the SSCS repertoire. The organization describes its actions as law enforcement, and while its actions may violate some laws and regulations, the SSCS does not appear to set out to actively break or change any law

⁵² Burbach notes that “the support for SSCS is far lower than the 90%+ who oppose whaling, but significantly larger than those who sympathize more with the whalers than with the activists” (2012:3, fn. 40).

⁵³ Burbach 2012:28.

⁵⁴ Jabour and Iliff 2009:271.

⁵⁵ *Ibid*, p.284.

⁵⁶ *Ibid*.

⁵⁷ Mégret 2008:5.

⁵⁸ *Ibid*, p.9.

⁵⁹ *Ibid*, p.25.

(and as we shall see, it goes to lengths to avoid doing so), but to enforce existing laws. The idea of ‘enforcing international law via CD’, a strategy entirely oriented around violating and challenging unjust laws, is problematic.⁶⁰ Framing acts of CD as enforcing international law may work in a domestic setting, where appeals to international law serve as an appeal to a ‘higher law.’ In the international arena activists either appeal to a ‘moral law’ above international law, or they claim to enforce existing international law, in which case they are not challenging the law at all (but rather enforcing it). This seems to suggest that there may be a role for activists in enforcing international law, but that the primary means by which this is accomplished is not CD.

Moffa’s account is perhaps one of the most targeted, specifically examining the strategy of the SSCS through a comparison to Greenpeace. Through the framework of the New Haven School on the principal functions of international lawmaking, Moffa describes two competing models of activism: ‘protest’ and ‘interventionist.’ He elaborates that the strategy of Greenpeace is characteristic of protest activism, which “consists of publicly organized, undoubtedly legal activities meant to put indirect pressure on the governmental or private entities that are purportedly violating international law... it aspires to shift public policy and community expectations.”⁶¹ This strategy fulfills two of the seven distinct categories of lawmaking actions outlined by the New Haven School, ‘law-promoting’ and ‘law-prescribing.’ Sea Shepherd’s strategy is described as “interventionist activism, a model that involves either borderline – or blatantly illegal tactics – to confront violators directly.”⁶² In comparison to protest activism, interventionist activism fulfills the actions of ‘law invocation’ and “direct *application* of force to implement existing laws and policies.”⁶³ Moffa notes that interventionist activism has been “more successful than protest activism in reducing the number of whales taken illegally.”⁶⁴ Moffa’s general argument as to why interventionist activism is effective is “that by giving real force to international law, the Sea Shepherds ...are performing the costly, and often unfunded, *invocation* and *application* functions arising from obligations to international conventions.”⁶⁵

⁶⁰ *Ibid*, p.28.

⁶¹ Moffa 2012:203.

⁶² *Ibid*.

⁶³ *Ibid*, p.210.

⁶⁴ *Ibid*, p.209, 202.

⁶⁵ *Ibid*, p.212.

States, such as Australia and the US, who could intervene and prevent SSCS activities choose not to, because the “the benefit of interventionist activism outweighs its costs.”⁶⁶

This account of SSCS strategy is one of the more compelling, but of course SSCS does not simply provide a service to states by supplying them with the law enforcement. The SSCS also appears to attempt to leverage states, particularly Australia, by condemning it for its inaction and by triggering embarrassing incidents within its jurisdiction. Factors which enable a strategy to be enacted are an important component of that strategy, but not the only mechanisms upon which a strategy relies to be effective. Moffa appears to have isolated one mechanism of SSCS strategy, but the SSCS seems to balance the act of providing a service for states with that of directly challenging them.

It is evident that there is a range of descriptions of SSCS strategy. It has been described as militant symbolic politics, ‘new’ vigilantism, interventionist activism, and as a number of different varieties of DA, yet none of these explanations is particularly compelling, well developed, or supported. Each appears to capture an aspect of SSCS strategy but fails to describe others. One of the drawbacks faced by these studies is that they rely on mediated sources – either accounts directly from activists or whalers themselves, or upon information filtered through the press or television. This information suffers from a lack of reliability, though this is not to suggest that movement and media sources do not provide some insight into SSCS strategy. This study seeks to overcome these limitations through the use of an inductive approach and primary data collection.

1.5.2 - Primary Sources

The SSCS releases information in order to serve campaign purposes. Most sources are written as memoirs, documenting a specific campaign or campaigns,⁶⁷ are autobiographical, written by or with Watson,⁶⁸ or are smaller sections/articles/chapters within movement

⁶⁶ *Ibid*, p.211-212.

⁶⁷ De Groot 2014; De Groot 2012; Hammarstedt 2011; Potts 2011; Bethune 2010; Court 2009; Heller 2007; Morris 1995; Seymour 1993; Wietse van der Werf, “At War for the Whales,” *Wwerf.com*, available at http://wwerf.com/prt/whale_war.pdf (accessed on October 6, 2011).

⁶⁸ Essemalali with Watson 2013; Watson 2003; Watson 1994; Watson as told to Rogers 1982.

literature.⁶⁹ There is considerable selection bias in these works, in so far as focus is given to highly successful or dramatic actions, while the more mundane or unsuccessful actions receive little coverage. While SSCS sources provide insight into the personal motivations, philosophies, and backgrounds of SSCS officers and crew members, and sometimes even provides detailed descriptions of innovative tactics and campaign actions, there is seldom any in-depth or reliable investigation of strategy, its origins, development, or implementation. The SSCS also produces its own media, and has an extensive database of past press releases, editorials, and video clips on its website. Not all information initially posted on the SSCS website is archived, and furthermore this information is presented specifically for public consumption.⁷⁰

In addition to his autobiographical and campaign-specific works, Watson has also written several texts of a more academic and strategic nature. In ‘On Precedence of Natural Law,’ Watson argues that the laws of nature and ecology trump those of man. *Neptune’s Manifesto* is a call to action, exhorting readers to take dramatic action to protect marine species and ecosystems.⁷¹ Both of these texts serve as calls to and justifications for, confrontational action. In *Earthforce!*, Watson addresses many practical and tactical issues, and presents a broad range of strategies suited to different situations, including image politics, covert ‘ecotage’, CD and so on. One of these situations, which could describe SSCS anti-whaling strategy is “the fifth situation [which] is to operate under the authority of international rules, regulations, laws, and treaties. This situation is primarily for confrontations in international waters where there is no law enforcement body with the powers of jurisdiction.”⁷² In one page, Watson describes how one would go about enacting this strategy by “setting yourself up as an unofficial law enforcement agency...taking vigilante action,” and explains that the primary mechanism behind the strategy is that “[i]f you could be stopped, then so should your opposition.”⁷³ While these sources are important, it has yet to be determined whether this strategy is actually being enacted by the SSCS. Furthermore, Watson does not go into detail on what might make these strategies effective, and as noted, entirely different mechanisms may be acting without the SSCS’s knowledge.

⁶⁹ Hammarstedt 2011; Potts 2011; Anonymous 2009:31 and 35; Watson 2004:279-287.

⁷⁰ Throughout the duration of the study an effort was made to capture information posted on the SSCS website lest it be removed. The SSCS website was regularly checked and press releases and editorials downloaded.

⁷¹ Watson 1998.

⁷² Watson 1993d:86.

⁷³ *Ibid*, p.87.

1.5.3 - Media Sources

The SSCS has been very successful in attracting media attention, and has been the subject of two journalistic books, numerous magazine and news stories,⁷⁴ and even works of fiction.⁷⁵ It has also been featured in several documentary films⁷⁶ and the television program *Whale Wars*.⁷⁷ SSCS operations are ongoing, with media clips constantly being uploaded to the internet. These media sources tend to lack reliability. Reports of actions are filtered through either the SSCS or the Japanese government, and both of these agents put their own, often conflicting, spin on reports. Media reports based on these press releases and accompanying footage are therefore prone to distortion. PO served as a means of addressing this problem. Being present on a SSCS campaign allowed the observation of events unfiltered as they transpired. As Jorgensen notes, PO is well suited to the study of phenomenon which are “somehow obscured from the view of outsiders.”⁷⁸ To my knowledge, the present study is the only academic study of the SSCS involving the use of PO.

1.6 - Clarification of Terms

It is useful to clarify a number of other terms which will also be used throughout the study. For a study dedicated to investigating strategy, it is important to have a clear understanding of what this term entails and some definitions are in order. Strategy can be defined as a “conscious, long-range, planned, and integrated general conception of an actor’s conflict

⁷⁴ See *inter alia* Shapiro 2010; Heller 2007; Khatchadourian 2007; Morris 1995:133, 157, and 165.

⁷⁵ See *inter alia* and see Abbey 1985; Abbey 1990; Green 2003; Ashbridge and Clark 2010; Cussler 2010; Trey Parker, “Whale Whores,” *South Park*, Season 13:11 (aired October 28, 2009).

⁷⁶ Trish Dolman, *Eco-Pirate: The Story of Paul Watson*, Screen Siren Productions, 2011; Peter Jay Brown, *Confessions of an Eco-Terrorist*, The Little Film Company, 2010; Jim Clark and Dan Stone, *At the Edge of the World*, Wealth Effect Media, 2008; Jonny Vasic, *30 Years on the Frontline*, Vasic Productions, 2008; Ron Colby, *Pirate for the Sea*, co-producer Patricia van Ryker, Artist Confederacy, 2008; Shannon Keith, *Behind the Mask: The Story of People Who Risk Everything to Save Animals*, Uncaged Films and ARME (Animal Rescue Media and Education), 2006.

⁷⁷ *Whale Wars* suffers from additional problems with reliability, as it is edited for entertainment and drama over veracity. Quotes are not in context, storylines are not necessarily consistent with reality, etc.; see Field Journal, photo-shopping of *Whale Wars* season 2 promotional poster discussion, January 29, 2011; and *Whale Wars* inaccuracies, crew member, December 23, 2010.

⁷⁸ Jorgensen 1989:12-13.

behaviour on the overall context.”⁷⁹ In other words, strategy can be seen as the principal concept that guides the manner in which an actor deploys assets (human, material or other) in the attempt to secure specific objectives.⁸⁰ Strategy is therefore the general approach one takes to accomplish desired goals, and is distinct from tactics. Tactics are subordinate to strategy, and are the specific techniques chosen to address a given situation.⁸¹ Thus strategy establishes a range of tactics considered both appropriate and effective in achieving the aims of an organization. In this sense “tactics may change from one situation to another... [while] strategic concepts are more stable and sustained even though they may be applied in different ways in different situations.”⁸² The SSCS objective is to end Japanese whaling in the Southern Ocean. They employ a strategy, which this study seeks to uncover, with the tactics they employ including prop-fouling, stink bombs, boardings, etc.

I will use Ackerman and Kruegler’s definition of a campaign as being “a series of observable, continual tactics in pursuit of a political objective.”⁸³ Ackerman and Kruegler elaborate that campaigns tend to have “a recognizable beginning, middle, and end,” a discernible leadership, and will often have names, thereby distinguishing them from random or spontaneous events or acts.⁸⁴ Tilly and Tarrow clarify that a campaign extends beyond a single event.⁸⁵ The SSCS’s multi-year effort to end Japanese whaling constitutes a single campaign. The organization designates each of its annual campaigning efforts as an ‘operation’ and gives that operation a name – for example Leviathan, Migaloo, Musashi, and Waltzing Matilda.

I use the term ‘repertoires,’ to refer to “the whole set of means [a group] has for making claims...on different individuals or groups,” which draw on inherited forms of collective action.⁸⁶ The study will avoid references to ‘protester’ and ‘protest’ and instead refer to those who work within INGOs/TAGs as ‘activists’ engaged in ‘activism.’ This distinction is made due to the difficulty in classifying the actions of the SSCS as ‘protest’, the organization’s vehement insistence that it does not protest, and to the limitations of this term. Despite its use as a catch-all term to refer to all forms of political activism, protesting connotes a specific action – appealing

⁷⁹ Rutch 1990:161.

⁸⁰ Ackerman and Kruegler 1994:46-47.

⁸¹ *Ibid.* p.47.

⁸² Seel and Plows 2000:115, citing Rucht 1990: 174.

⁸³ Ackerman and Kruegler 1994, 10-11; see also Chenoweth and Stephan 2011:14.

⁸⁴ Ackerman and Kruegler 1994:10.

⁸⁵ Tilly and Tarrow 2007:119.

⁸⁶ See for example Tilly and Tarrow 2007:4; Doherty 2000:62.

to an authority to intervene in some way – and as a result, fails to capture the full range of actions in which activists engage, such as leveraging, awareness raising, or coercing.

In this study, SSCS strategy and actions are often classified as ‘aggressive’ and ‘confrontational.’ Here we can build from Tilly and Tarrow’s definition of confrontational contention as being “new or illegal types of protest, not characterized by violence but using certain resources in order to provoke surprise, thus generating tensions or feelings of defiance among the authorities and the public.”⁸⁷ Definitions of violence are hotly contested; many activists deny that the destruction of property constitutes a form of violence, and that one can only be violent towards living things.⁸⁸ As one SSCS crew member stated, “our actions are aggressive, [the whaler’s] actions are violent.”⁸⁹ Designating an act as violent is often seen as a way to consign that act to a repertoire outside of civil society, and into the realm of what Price deems ‘uncivil society.’⁹⁰ We can see this in the initial approach taken by Plant, as previously discussed, yet this ignores the ‘gray area phenomenon’ which may challenge or rub up against certain definitions of violence but still fall within the actual repertoires of INGOs/TAGs. Consequently the terms ‘aggressive’ and ‘confrontational’ appear to best describe SSCS strategy and this study avoids employing contested terms such as ‘violent.’

1.7 - Outline of Study

Chapter 2 begins with a review of conventional INGOs/TAGs strategies. Through this review, the broader trends within the literature on INGO/TAG strategy are mapped, including various typologies and categorizations. This section includes discussions of structure and agency in determining strategy, along with questions of issue selection. Specific challenges to IENGOS/ETAGs will be developed upon along with some of the solutions which these actors have employed in order to overcome these challenges. Throughout this examination, the manner

⁸⁷ Tilly and Tarrow 2007:51, citing López Maya 2002:203.

⁸⁸ Edward Abbey quoted by Rowell 1996:152; see also Graeber 2009:177; Vanderheiden 2008:315; Best and Nocella 2004:25; Cohen 1997:174; Foreman 1987:14.

⁸⁹ Field Journal, Celeste McGrath, galley and deck crew on the *Bob Barker*, February 4, 2011.

⁹⁰ Price 2003:580.

in which the strategy of the SSCS appears to diverge from common understandings of INGO/TAG strategy will be explored.

Chapter 3 develops the methodology of the study. It elaborates on the selection of the single case of the SSCS anti-whaling strategy, before detailing how process tracing, PO, interviews, and triangulation were used in data collection. Chapter 3 also includes a discussion of the methodological challenges inherent in studying an organization such as the SSCS, and outlines how the study sought to overcome these challenges, including issues of confidentiality.

Chapter 4 begins by outlining the background of the whaling issue, including the history of whaling and the formation of the IWC. It then outlines the progress made by INGOs/TAGs using conventional strategies, specifically the enactment of the global moratorium on commercial whaling and the subsequent roadblock and standoff within the IWC following the moratorium. The chapter then focuses on the historical background of Japanese whaling, some of the challenges faced by INGOs/TAGs attempting to use conventional strategies against it, and questions surrounding the legality of the Japanese 'research' whaling program. Chapter 4 concludes with a survey of the legal context of the Southern Ocean where the campaign occurs.

Chapter 5 examines the SSCS and its strategy in detail. It provides background on the SSCS's philosophy and history, both of which have influenced the development of SSCS strategy. It then considers how the SSCS articulates its goals and the strategy it claims to use to accomplish these goals. The remainder of the chapter focuses specifically on the Antarctic anti-whaling strategy of the SSCS. It begins with a short history of the SSCS anti-whaling campaign, and then provides a chronology of 'Operation No Compromise.' This is followed by observations made during the Operation, which are organized into sub-sections using Keck and Sikkink's four categories of INGO/TAG action. This includes sub-sections examining the legality of SSCS actions and their impact on Japanese whaling operations, as well as other features of SSCS strategy gathered through fieldwork and triangulated from a range of other sources. Two major themes are drawn from these observations: the organization's efforts to achieve direct outcomes, and a pervading use of references to international law in almost every aspect of operations.

Chapter 6 considers the first of these two themes, identifying the SSCS's focus on achieving direct results with the strategy of DA. A review of the limited coverage which DA has received by the IR literature is conducted, after which a definition of DA is developed. The

strategy of DA is then examined in greater depth. This chapter then considers the SSCS's use of DA, seeking to determine whether the organization has simply adapted DA – a strategy most used in the domestic setting – for use in the international arena, or whether it is doing something else. The SSCS appears to be using DA as a mechanism in a more targeted enforcement strategy, whereby the organization attempts to directly enforce international law.

Chapter 7 scrutinizes the second of the two major themes, and looks at the SSCS's use of DA as a means of enforcing international law, a strategy which is described as 'direct enforcement' (DE). The chapter then details why and how the DE of the SSCS works, developing the theory of DE. It begins with an overview of the characteristics typical of DE, and examines how this strategy differs from conventional INGO/TAG strategy. The key mechanisms of DE are then detailed, including the protection it offers practitioners, the power inherent in invoking the law, the type of power it exerts on states, and how making DE claims create practices of legality which strengthen the compliance pull of laws and asserts the right of NSAs to enforce international law.

Chapter 8 uses the SSCS's bluefin tuna campaign as a case study in order to explore issue selection and DE. This case study also serves as a means of establishing that DE is not unique to the SSCS's anti-whaling campaign. The chapter concludes with a survey of a number of (I)NGOs/TAGs, ranging across issues, theatres of operation, and the domestic and international arenas which appear to also be employing forms of DE. This serves as a means of demonstrating that DE is not idiosyncratic to the SSCS, and can be employed by a wide range of NSAs.

Chapter 9 concludes the study with a brief exploration of the possibilities that DE may presents to INGOs/TAGs, some of the limitations of this strategy, and additional areas of inquiry and questions arising.

CHAPTER 2 – CONVENTIONAL INGO/TAG STRATEGIES

This chapter explores the literature on INGOs/TAGs in IR, in order to understand how these actors are generally considered to exert influence and power in the international arena and to demonstrate how the SSCS and its strategy deviate from these conventional understandings. The chapter begins by defining what is meant by transnational civil society (TCS), INGO and TAG. The growing role of INGOs/TAGs in IR is then examined, and questions of measuring INGO/TAG influence, their legitimacy, and what may prompt these actors to campaign transnationally are explored. Conventional INGO/TAG strategies are then considered. The specific challenges to IENGOS/ETAGs will be elaborated along with some of the solutions which IENGOS/ETAGs have employed to overcome these challenges. Throughout the chapter, the ways in which SSCS practices deviate from those practices outlined in the literature are highlighted. This chapter argues that the actions of the SSCS (tactics, rhetoric, strategy), and their apparent success and impact cannot adequately be explained by the existing INGO/TAG literature.

2.1 - NGOs and TAGs Defined

2.1.1 - *Transnational Civil Society and NGOs*

The broad aim of this study is to explore and expand our understanding of the strategies employed by IENGOS and ETAGs. Before this can be done, these terms must be clearly defined. Scholars describe IENGOS and ETAGs as being part of what is commonly referred to as TCS. TCS generally “refers to self-organized advocacy groups that undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest.”⁹¹ Here ‘transnational,’ referring to coordinated campaigns of a cross-border nature, is chosen in lieu of ‘global’ “to emphasize both the border-crossing nature of the links and the fact that rarely are

⁹¹ Price 2003:580; see also Florini and Simmons 2000:7.

these ties truly global, in the sense of involving groups and individuals from every part of the world.”⁹²

There are generally three broad categories of entities which campaign on environmental issues transnationally: 1) epistemic communities, 2) INGOs, and 3) TAGs/TANs. Epistemic communities are “networks of experts on a certain policy issue”⁹³ with a “shared set of causal *and* principled beliefs, including shared notions of validity.”⁹⁴ As such, they typically rely more on the use of information politics than do INGOs and TAGs. Khagram et al. offer a clear definition of non-governmental organization (NGOs) as “private, voluntary, nonprofit groups whose primary aim is to influence publicly some form of social change.”⁹⁵ An international NGO (INGO) would then be an NGO “composed of members from two or more countries, and are organized to advance their member’s international goals and provide services to citizens of other states through routine transactions with states, private actors, and international institutions.”⁹⁶ Khagram et al. distinguish NGOs from more amorphous social movements by noting that “[g]enerally, NGOs are more formal and professional... with legal status and paid personnel.”⁹⁷ In other words, an INGO is an organization, with a name, structure, and voluntary membership. These features distinguish the INGO from the TAG in that a TAG can comprise of numerous INGOs and other NSAs.

2.1.2 - TAGs and TANs Defined

The term TAG/TAN is widely used to describe groups or networks of various NGOs and other NSAs operating collaboratively towards some end.⁹⁸ A TAG is generally seen as meeting three requirements: TAGs are not formed by intergovernmental agreement and their views are independent of any national government; TAGs are organized across state boundaries and address issues of a trans-border nature (in other words they operate in the international arena);

⁹² Florini and Simmons 2000:7; see also Tarrow and McAdam 2005:123, quoting Olesen 2002:3; Della Porta and Tarrow 2005:2; and Tarrow 2001:11.

⁹³ Arts 2003-2004:3.

⁹⁴ Emphasis original, Zürn 1998:642.

⁹⁵ Khagram, Riker and Sikkink 2002: 6; see also Simmons 1998:83, quoting a 1994 UN document, and the definitions used by Charnovitz 2006:350; and Wapner 2002:39.

⁹⁶ Tarrow 2001:12.

⁹⁷ Khagram, Riker and Sikkink 2002:6.

⁹⁸ Tarrow 2001:13.

and TAGs seek to advance ‘principled causes.’⁹⁹ TAGs are more formalized structures than transnational social movements, which Khagram, Riker and Sikkink define as “sets of actors with common purposes and solidarities linked across country boundaries that have the capacity to generate coordinated and sustained social mobilization, in more than one country, to publicly influence social change.”¹⁰⁰ Unlike TNCs or dark networks, which are motivated by private interests – profit – TAGs “are driven primarily by shared values or principled ideas—ideas about what is right and wrong—rather than shared causal ideas or instrumental goals.”¹⁰¹

The word ‘advocacy’ is not intended to describe the primary strategy of these groups, but rather to reflect that “they are organized to promote causes, principled ideas and norms, and often involve individuals advocating policy changes that cannot be easily linked to their own personal ‘interests.’”¹⁰² Keck and Sikkink explain that “advocates plead the causes of others or defend a cause or proposition; they are stand-ins for persons or ideas.”¹⁰³ Keck and Sikkink use the term TAN, referring to the network structure assumed by many of these entities and defining a network as a form of organization “characterized by voluntary, reciprocal and horizontal patterns of communication and exchange.”¹⁰⁴ The study will not concern itself with network politics and the term TAG is preferred to TAN. Here networks will be treated as actors, as opposed to structures. This study is interested specifically in how actors employ strategy transnationally, in so far as they act as individual entities, and therefore treats the TAN or TAG as a single unit, capable of formulating and executing strategy as an individual organization, group, or (I)NGO. ‘INGO’ and ‘TAG’ are considered as synonymous, with these terms understood to refer to international actors which are purposeful and strategic actors.¹⁰⁵ The study will therefore refer to INGO/TAG strategy.

⁹⁹ See for example Keck and Sikkink 1998:1; Sikkink 1993:412; and Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

¹⁰⁰ Khagram, Riker and Sikkink 2002:8.

¹⁰¹ Sikkink 1993:412.

¹⁰² Keck and Sikkink 1999:91; and see Keck and Sikkink 1998:8-9.

¹⁰³ Keck and Sikkink 1999:91.

¹⁰⁴ *Ibid.*, and p.8; also Khagram, Riker and Sikkink 2002:7; Williams 2001:66.

¹⁰⁵ See Sikkink 2009:229; see also Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

2.2 - The Expansion of INGOs and TAGs in International Relations

The literature describing INGOs and TAGs in general, and IENGO and ETAG strategy in particular, has a place in the broader IR literature. Traditionally this literature has been dominated by (neo-) realism and (liberal) institutionalist paradigms which focus exclusively “and in a self-conscious way, on the predominant role of states in world politics.”¹⁰⁶ However these models have been increasingly challenged by positions which have given an increased role to NSAs. Auer described this as a “crisis in contemporary international studies [emerging] between the traditional or state-centered paradigm and the insurgent or multi-stakeholder paradigm of world politics.”¹⁰⁷ This global civil society paradigm is a constructivist vision, depicted in Princen and Finger’s *Environmental NGOs in World Politics*, which describes “global environmental governance as a multi-level, multi-actor process, and one that bridges local, national, and supranational environmental and policy contexts.”¹⁰⁸

2.2.1 - Growing Role of NSAs in IR

Theories, particularly from the constructivist school, have emerged to explain the increasingly visible role of NSAs in IR. While it is undeniable that states remain the “key rule-maker, policy implementers and dispute settlers,”¹⁰⁹ numerous studies identify the growing role of (I)NGOs and TAGs in world affairs.¹¹⁰ It should be noted that the role of INGOs and TAGs in IR is far from a new phenomenon; historical examples abound.¹¹¹ However there has been a dramatic increase in the number of TAGs in the past several decades. Scholars attribute this increase to several factors, foremost amongst them being technological and cultural changes such as the emergence and rapid expansion of the internet and the availability of cheap international

¹⁰⁶ Khagram, Riker and Sikkink 2002:6, referencing the work of Waltz 1979, Krasner 1985, Keohane 1989, and Katzenstein, Keohane, and Krasner 1998.

¹⁰⁷ Auer 2000:156.

¹⁰⁸ *Ibid.*, p.163, summarizing Princen and Finger 1994:221; see also Betsill and Bulkeley 2004:475.

¹⁰⁹ Arts 2005:185; Auer 2000:158.

¹¹⁰ Wapner 2002:37; see also Sikkink 2005:152; Zürn 1998:644; Bramble and Porter 1992; Stairs and Taylor 1992; Willets 1996; Gordenker and Weiss 1995:543.

¹¹¹ See for example Doherty and Doyle 2008: 3; Doherty and Doyle 2006:699; Sikkink and Smith 2002:25; Florini and Simmons 2000:8; Burgeon 1998:909; Ackerman and Krueger 1994.

travel.¹¹² Della Porta and Tarrow point out that “the collapse of the Soviet bloc encouraged the development of forms of nonstate action that had previously been blocked by Cold War divisions.”¹¹³ However technological changes remain the predominant cause. As Tarrow notes, “[n]ew electronic technologies and broader access to them have enhanced the capacity for movement campaigns to be organized rapidly and effectively in many venues at once.”¹¹⁴ ETAGs are no different, and as Sikkink and Smith note “[t]ransnational environmental organizations have grown most dramatically in absolute and relative terms.”¹¹⁵ After the 1972 United Nations Conference on the Human Environment (Stockholm Conference), considered by many as the progenitor of the environmental movement, the number of environmental non-governmental organizations (ENGO) rose from 2 in 1952 to 10, and today there are thousands of (I)ENGOS and ETAGs operating around the world.¹¹⁶

2.2.2 - Determining Relevance and Measuring Influence

Early studies, such as those of Wapner, and Princen and Finger, sought to establish the importance of these NSAs in IR.¹¹⁷ In addition to documenting the various instrumental roles of INGOs/TAGs, they also sought to develop means of measuring their influence or effectiveness.¹¹⁸ In so doing they asked two distinct questions: how much influence do INGOs/TAGs have? And how do INGOs/TAGs exert influence? The first question addresses effectiveness, the second examines strategy. While these studies serve to illuminate previously unexplored INGO/TAG strategies, they encounter challenges when seeking to measure influence.¹¹⁹ While it is possible to say that the efforts of a single INGO or TAG had an influence on the formulation of an international institution, regime, agreement, or policy, quantifying this influence is another matter. Underdal notes that while “a regime can be

¹¹² Keck and Sikkink 1998:200; see also Tarrow 2005:11; Mittleman 1998.

¹¹³ Della Porta and Tarrow 2005:7; and see Doherty and Doyle 2006:700.

¹¹⁴ Tarrow 2005:6.

¹¹⁵ Sikkink and Smith 2002:33; Doherty and Doyle 2006:698-699, 700.

¹¹⁶ *Ibid.*

¹¹⁷ See Arts, 2003-2004: 8; Auer 2000:158, 159; Wapner 1996; Princen and Finger 1994.

¹¹⁸ See *inter alia* Bailer, Bodenstein, and Heinrich 2013; Schofer and Hironaka 2005:31; Betsill and Corell 2001:80; Peet 1994:4-5.

¹¹⁹ For explorations of the challenges of measuring TAN impact see Keck and Sikkink 1998:5; and see Rohrschneider and Dalton 2002; Betsill and Corell 2001; Corell and Betsill 2001.

considered effective to the extent that it successfully performs a certain (set of) function(s) or solves the problem(s) that motivated its establishment,” there is still considerable difficulty in determining effectiveness.¹²⁰ For example, he draws a distinction “between the formal output of a decision-making or regime-formation... and the set of consequences flowing from the implementation of and adaptation to that regime.”¹²¹ A regime may successfully produce a new set of rules and regulations (output), however these must still be implemented, and then ultimately have an effect on behaviour (outcome), which in turn must enact some sort of positive change on the biophysical environment (impact).¹²² Furthermore, Underdal points out that there are challenges in ascribing change to the implementation of outputs, when it is also possible that changes in behaviour can arise unilaterally, as a result of learning which occurs during the negotiation process, “even in the absence of any legal obligation to do so.”¹²³ Does one therefore consider outputs, outcomes or impacts as a means of measuring the success of a campaign? Impressive policy outputs may not be implemented, and implemented policies may still fail to have any impact on the environment. Does raising awareness of an issue constitute a success? Or as Susskind and others suggest, is it “a mistake to measure success in terms of anything less than tangible environmental improvements”?¹²⁴

In the context of actually measuring influence, Underdal points to further challenges, such as the need to establish a point of reference, and crucially, to the use of a standard metric of measure. One can compare the relative effectiveness of a regime by comparing what “is *actually* accomplished and what *could have been* accomplished,” however as Underdal notes, this “immediately puts before us the intriguing question of what constitutes the *maximum* that a particular group of actors can accomplish.”¹²⁵ An alternative is to “evaluate a regime against some concept of a good or ideal solution.”¹²⁶ A further question relating to establishing a point of reference is that of timing; ultimately “any attempt at measuring effectiveness will have to refer to the state of affairs at *one particular point in time*.”¹²⁷

¹²⁰ Underdal 2002:4.

¹²¹ *Ibid*, p.5-6, citing Easton 1965.

¹²² *Ibid*, p.5, 6.

¹²³ *Ibid*, p.5, citing Underdal 1994.

¹²⁴ Susskind 1994:12; see also Underdal 2002:11; Zürn 1998:637.

¹²⁵ Underdal 2002:9.

¹²⁶ *Ibid*, p.8.

¹²⁷ *Ibid*, p.13.

Not only do activists attempt to influence policy, but many of their symbolic actions are directed at changing the minds of the general public.¹²⁸ Wapner notes that it is difficult to appreciate “the political effectiveness of NGO cultural efforts because cultural changes are difficult to assess.”¹²⁹ Finnemore and Sikkink explain that “internalized norms can be both extremely powerful (because behavior according to the norm is not questioned) and hard to discern (because actors do not seriously consider or discuss whether to conform).”¹³⁰ Consequently, work on the power of image politics and framing suggest that some of the most effective campaigns may be difficult to observe, let alone measure. There is also a need for a standardized metric of evaluation, which can be particularly challenging if various actors are attempting to accomplish different outputs, outcomes or impacts. If no standardized measurement has been determined, the “finding that one independent variable had a greater impact than another will be open to diverging interpretations.”¹³¹

The SSCS simplifies the evaluation of its strategy. The organization measures its success in achieving its stated goal of stopping the Japanese from hunting whales by ‘number of whales saved’ – assessing the impact of its actions on the Japanese’s ability to reach their quotas. The SSCS is therefore focused almost entirely on ‘outcomes,’ specifically stopping whaling activities. It is not interested in generating ‘outputs’ in terms of cultural changes or raising awareness, nor does it appear particularly interested in the actual impact that saving a particular number of whales has on the conservation status of those species. While this allows one to measure the direct outcomes of SSCS actions, it does not allow one to determine whether SSCS strategy is more effective than those of other INGOs/TAGs. SSCS actions also exert influence on states. The use of counterfactuals serves as a means to identify the influence that is being exerted, but not how much. The aim of this study is to determine whether SSCS strategy is effective and the factors which make it so, not whether the strategy is more or less effective than other strategies. It may be possible to say that aspects of SSCS strategy are more effective at achieving specific outcomes than other INGOs/TAGs, for example directly saving whales or circumventing normative deadlocks, but not that SSCS strategy is more effective overall, in as

¹²⁸ See particularly Wapner 1996:12.

¹²⁹ Wapner 2002:53.

¹³⁰ Finnemore and Sikkink 1998:904.

¹³¹ Underdal 2002:14, 9-10.

much as the strategies of other INGOs/TAGs may not attempt to directly save whales or be designed to circumvent normative deadlocks.

2.2.3 - INGO and TAG Legitimacy

The explosion in numbers of (I)NGOs/TAGs in recent years has led to another stream of research, a normative one, which considers whether (I)NGOs/TAGs should in fact have influence and power in IR.¹³² Simmons notes that while “[h]ailed as the exemplars of grassroots democracy in action, many TANs are, in fact, decidedly undemocratic and unaccountable to the people they claim to represent.”¹³³ (I)NGOs and by extension TAGs, are often criticized as lacking transparency, and are considered neither democratic nor accountable,¹³⁴ a lack of representativeness which Sikkink notes, could further accentuate North-South differences.¹³⁵ Risse argues that these problems are symptomatic of an already existing democratic deficit in IR.¹³⁶ Price furthers that there are concerns that (I)NGOs may “subvert legitimate avenues of politics,”¹³⁷ a position which is developed by Bolton and others, who argue that NGO advocacy gives states a ‘second bite at the apple.’¹³⁸ Others have raised concerns over (I)NGO motives, and note that it is often difficult to discern “whether they are not promoting themselves as much as their causes.”¹³⁹ This project will not dwell on questions of INGO/TAG legitimacy. The assumption is that INGOs/TAGs exist and have some degree of power; it does not necessarily require them to be legitimate actors. This being said, the assumption is that IENGOS/ETAGs fulfill an important function in working towards environmental conservation.

Despite detractors, INGOs/TAGs are generally held in high esteem and are considered to speak with moral authority. Activists are aware of this, and protect and bolster their reputations, building upon their ‘reputational capital.’¹⁴⁰ Activists spend this reputational capital to exert

¹³² For NGO and TAN(G) legitimacy see Fassin 2009; Khagram, Riker and Sikkink 2002; Florini and Simmons 2000; Zürn 1998:648; Wapner 1996:145; Gordenker and Weiss 1995.

¹³³ Simmons 1998:83; see also Nelson 2002a:131, 141; Gordenker and Weiss 1995: 553.

¹³⁴ Sikkink 2002:306, 314.

¹³⁵ *Ibid.*, p.307-308.

¹³⁶ Risse 1999: 186; see also Price 2003:591.

¹³⁷ Price 2003:590.

¹³⁸ Bolton 2000:217; see also Charnovitz 2006:352.

¹³⁹ Slaughter 2000a:99; Crocker 1997.

¹⁴⁰ Sasser, et al. 2006:5; and see Sikkink 2002.

moral leverage. Sikkink illuminates some of the attributes which INGOs/TAGs should foster in order to gain legitimacy. These include: impartiality or independence, veracity and reliability, representativeness, accountability and transparency.¹⁴¹ Together with expertise, moral influence, and political legitimacy, these make up the principal sources of INGO/TAG authority.¹⁴² INGOs/TAGs also have the ability to impart legitimacy to other actors and to foster legitimacy within institutions, for example, by serving as validators; endorsing or condemning international agreements. INGOs/TAGs may also serve as *amicus curiae* (friends of the court) in hearings, certify information, or establish and promote private authority regimes approving products or processes.¹⁴³ As uncovered in analysis of the SSCS, international law has been overlooked as an alternative source of INGO/TAG authority. The SSCS does not appear to rely on moral authority, but rather legal authority, claiming to derive its mandate for actions not from norms, but from international law.¹⁴⁴

2.2.4 - Why Go Transnational?

There is an extensive literature seeking to explain how and why NGOs campaign internationally and form TAGs, as well as why INGOs and TAGs may choose to work with domestic actors. This move from the domestic to the international is what Tarrow and McAdam describe as ‘upward scale shift.’¹⁴⁵ Several factors explain upward scale shift. First is the fact that transnational issues, like environmental degradation, call out for transnational solutions, making these types of issues more likely to be the subject of transnational campaigns.¹⁴⁶ In the ‘Dynamic Multilevel Governance’ model Sikkink presents four different circumstances based on the openness of domestic and international political opportunity structures which lead to different models of domestic and international interaction. Tarrow defines political opportunity structure as the “consistent – but not necessarily formal, permanent or national – dimensions of the

¹⁴¹ Sasser et al. 2006:5; Sikkink 2002:313-314.

¹⁴² Price 2003:587. For moral authority see Epstein and Barclay 2013; Sikkink 2002:303-304; Burgerman 2001.

¹⁴³ See for example Charnovitz 2006; Sasser et al. 2006.

¹⁴⁴ Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

¹⁴⁵ Tarrow and McAdam 2005:125; see also Tilly and Tarrow 2007:94; Pralle 2006:5; Mittelman 1998:862.

¹⁴⁶ Rohrschneider and Dalton 2002:514.

political environment that either encourage or discourage people from using collective action.”¹⁴⁷ The ‘boomerang pattern’ describes a strategy whereby “domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside.”¹⁴⁸ Risse and Sikkink later expanded on the boomerang model and developed the spiral model which takes into account the fact that this process can involve a greater range of political moves and become a much more extended process.¹⁴⁹ Facing a closed domestic political opportunity structure, activists internationally seek out those which are more open. In the ‘democratic deficit/defensive transnationalization’ model, “activists are forced defensively into the international arena, and the brunt of their activity is aimed at protecting gains made within their domestic polities.”¹⁵⁰ Here activists endeavour to protect against a relatively open domestic political opportunity structure, by shifting issues to one more closed. Sikkink suggests that in situations where activists face closed opportunity structures at both levels there is a diminished chance of activism at either level.¹⁵¹ Others have noted that there are certain circumstances when upward scale shift may be detrimental to domestic groups, for example when so doing may cost domestic groups autonomy or legitimacy.¹⁵²

Situations where domestic and international opportunity structures are relatively open present the greatest range of potentially advantageous possibilities for activists. Sikkink suggests that when this occurs ‘insider-outsider coalitions’ can form, with domestic activists pursuing international options complimentary to their domestic activities.¹⁵³ The reasons why a domestic group may seek to escalate their campaign to the international level even in the face of a relatively open domestic political opportunity structure speaks to the general benefits which groups accrue when making such a move. For a domestic NGO, cooperation with INGOs/TAGs brings “material resources, name recognition, and media attention to local or domestic environmental movements, not to mention access to a wider audience.”¹⁵⁴ This, in turn, provides

¹⁴⁷ Tarrow 2005:23; see also Tilly and Tarrow 2007: 49.

¹⁴⁸ Keck and Sikkink 1998:12; see also Andonova and Mitchell 2010; Thomas 2002:74; Slaughter 2000a:110; Slaughter 2000b; Keck and Sikkink 1999:93; Finnemore and Sikkink 1998; Slaughter 1997:194.

¹⁴⁹ Risse and Sikkink 1999; see also Sikkink 2005:154, 161; Khagram, Riker and Sikkink, 2002:19.

¹⁵⁰ Emphasis original, Sikkink 2005:155.

¹⁵¹ *Ibid*, p.156.

¹⁵² Bob 2005:17; Fisher 1997:453.

¹⁵³ Sikkink 2005:164-165.

¹⁵⁴ Pralle 2006:97; see also Sikkink 2005:156, 165; Keck and Sikkink 1998:107; Princen and Finger 1994.

domestic groups with greater legitimacy, and helps deter state violence against them.¹⁵⁵ Operating internationally also provides NGOs with a wider range of possible strategies, expanding the number and nature of targets and potential allies.¹⁵⁶ INGOs and TAGs also benefit from working with domestic groups, which lend them legitimacy.¹⁵⁷ Domestic groups also have access to ‘on the ground’ information, can act as certifiers of information, provide a human face to an issue, and can serve as a channel into the national political arena.¹⁵⁸

One trend in the literature concerning (I)NGOs and TAGs, is the insistence that “all NGO practices remain discursively constructed through reference to the ‘local.’”¹⁵⁹ Transnational action has been described as a continuation of domestic politics by other (transnational) means.¹⁶⁰ Activists are, as Tarrow describes, rooted cosmopolitans, “people and groups who are rooted in specific national contexts, but who engage in contentious political activities that involve them in transnational networks of contacts and conflicts.”¹⁶¹ Risse-Kappen notes that “[i]n order to gain impact, transnational actors must, first, gain access to the political system of their target state...”¹⁶² This does not describe all groups, however, and in fact the SSCS stands in stark contrast to the general image of organizations rooted in domestic contexts. The SSCS appears to be a child of the international system itself, and is rooted in this system. The SSCS’s anti-whaling efforts do not entail campaigning in or seeking access to a domestic arena, nor do cooperation or alliances with grassroots groups play any significant part of SSCS campaigns. It appears as though SSCS strategy is formulated without reference to the local and that it focuses exclusively on issues within the international system.

2.3 - INGO and TAG Strategy

There are a broad range of strategies and tactics available to INGOs and TAGs, with the literature suggesting that these can be employed at three different stages of the global policy

¹⁵⁵ Bob 2005:4.

¹⁵⁶ See for example Tarrow 2005:8-9.

¹⁵⁷ Pralle 2006:97; see also Tarrow 2005; Rohrschneider and Dalton 2002.

¹⁵⁸ Burgerman 2001:16.

¹⁵⁹ Fisher 1997:454; and see Tarrow 2005:43.

¹⁶⁰ Rohrschneider and Dalton 2002:511.

¹⁶¹ Tarrow 2005:29.

¹⁶² Risse-Kappen 1995:25; and see Tarrow 2001:6.

making process: 1) the agenda setting stage – identifying problems of concern, and producing information with an aim of promulgating norms and forcing principled issues onto the international agenda; 2) as indirect or direct participants in international negotiations – fostering policy and discursive change within institutions to develop solutions; and 3) during the implementation of solutions – encouraging behavioural change and compliance with regimes and serving as monitors of international agreements.¹⁶³ At each stage, activists achieve influence through various forms of ‘advocacy’, which Fassin classifies along a continuum, ranging from ‘engagement strategy’ which involves dialogue and persuasion to ‘confrontational strategy’ involving threats and adversary actions.¹⁶⁴ Activists generally rely more heavily upon methods employing persuasion, socialization, moral pressure and information provision, rather than coercive methods.¹⁶⁵ Florini and Simmons note that this follows from the general concept in IR, which assumes “a hierarchy among the instruments of power: military force ranks highest, then economic resources, then – far down the list, if mentioned at all – such ‘soft’ instruments as moral authority or the power of persuasion.”¹⁶⁶ International actors – states, TNCs, TAGs, etc. – “vary greatly in their ability to use these instruments”¹⁶⁷, and INGOs and TAGs are “rarely able to ‘coerce’ agreement to a norm – they must persuade.”¹⁶⁸ The SSCS’s confrontational approach appears as more coercive than persuasive. Rather than relying on arguments, the organization uses action, which is designed to directly influence the behavior of targets, i.e. to make the Japanese stop whaling, through physical intervention.

Examining different forms of power within the international system, Arts describes three ‘faces’ of power: “(1) *decisional* power, related to policy-making and political influence; (2) *discursive* power, related to framing of discourse; and (3) *regulatory* power, related to rule-making and institution-building.”¹⁶⁹ Activists are able to exercise all three forms of power, but through different means. Activists exercise decisional power by (in)directly intervening in the decision making process through a range of approaches including lobbying, advocacy,

¹⁶³ Eilstrup-Sangiovanni and Phelps Bondaroff 2014; Sikkink 2009:235; Price 2003:584; Auer, 2000:159; Zürn 1998:646; Wapner 1996; Princen and Finger 1994.

¹⁶⁴ Fassin 2009:511-512 referencing Hund et al. 2002, Lawrence 2002, and Stafford et al. 2000.

¹⁶⁵ Khagram, Riker, Sikkink 2002:11.

¹⁶⁶ Florini and Simmons 2000:10.

¹⁶⁷ *Ibid.*

¹⁶⁸ Finnemore and Sikkink 1998:900; see also Khagram, Riker and Sikkink 2002:12; Betsill and Corell 2001:73.

¹⁶⁹ Emphasis original, Arts 2003-2004:16.

monitoring, protest and participation.¹⁷⁰ These approaches are each designed to influence the decision making process, in so far as activists lack the authority to make binding decisions on their own. Instead, activists use information and knowledge to their advantage (see 2.3.2.1 - Information Politics, below), using information, along with symbolic politics through the exercise of discursive power, “changing the normative context of policy-making.”¹⁷¹ Activists are also occasionally able to wield structural power, setting the rules of the game through the creation of private rule-making initiatives or authority regimes.¹⁷² SSCS actions appear to exert a form of regulatory power, in so far as the organization claims to enforce existing rules, challenging the more passive approach generally taken by INGOs/TAGs with respect to regulatory power, which generally entails the creation of *voluntary* private authority regimes certifying approved products or processes, such as the Forest Stewardship Council (FSC).¹⁷³

2.3.1 - Insider-Outsider Politics and Venue Shopping

The literature makes a distinction between insider and outsider INGO/TAG strategies.¹⁷⁴ ‘Insider strategies’ are aimed at influencing decision-makers directly, “using information and expertise to lobby policy-makers and working within institutions and with governments.”¹⁷⁵ Insiders will often take part “in highly institutionalized service and advocacy activities”, within international intuitions.¹⁷⁶ In contrast, ‘outsider strategies’ challenge these institutions and organizations, and employ repertoires which include boycotts and protests.¹⁷⁷ Outsider strategies are seen as less predictable and often as a last resort if access to an institution is denied. As a result, insider strategies are generally considered to be more effective.¹⁷⁸ Outsider tactics are also seen as being more prone to backlash.¹⁷⁹ The idea that insider strategies are more successful than

¹⁷⁰ *Ibid*, p.18, emphasis original.

¹⁷¹ Arts 2003-2004:16; and see Wapner 1995:320.

¹⁷² Sasser et al. 2006; Arts 2005; Arts 2003-2004:16.

¹⁷³ Sasser et al. 2006.

¹⁷⁴ See for example Arts 2005; Tarrow 2005:45; Arts 2003-2004:18; Betsill and Corell 2001:67; Ryan 1991:5.

¹⁷⁵ Betsill and Corell, 2008:39.

¹⁷⁶ Tarrow 2005:45.

¹⁷⁷ *Ibid*.

¹⁷⁸ See discussion in Cracknell 1993:16.

¹⁷⁹ Betsill and Corell 2008:39; see also Sasser et al. 2006.

outsider strategies is challenged by the success of the SSCS's approach, which is distinctly outsider.

The distinction between insider and outsider strategies highlights another dominant theme in the literature; that international institutions “are of *central* importance for the making and mobilization of transnational social movements.”¹⁸⁰ Tarrow describes international institutions as ‘coral reefs,’ an analogy which depicts how institutions serve as “focal points for contention.”¹⁸¹ Institutions “present clear political opportunity structures for transnational advocacy.”¹⁸² Institutions are valuable to INGOs/TAGs for many of the same reasons that they are valuable to states. As Slaughter elaborates, institutions “decrease transaction costs, provide information, facilitate monitoring of treaty obligations, enhance possibilities for linkages in international negotiations, and increase the salience of State negotiations.”¹⁸³

Institutions create the spaces which make insider approaches possible. An entire literature on venue shopping explains how groups “seek out a setting where they can air their grievances with current policy and present alternative policy proposals.”¹⁸⁴ Sound strategy dictates that groups seek out a “decision setting that offers the best prospects for reaching one’s policy goals, an activity referred to as venue shopping.”¹⁸⁵ This is what Sikkink and Smith refer to as ‘strategic venue shift.’¹⁸⁶ In this way, venue shopping can act as a means of overcoming bias¹⁸⁷ and political blockages, as well as a means of forwarding a specific policy outcome, in so far as certain venues are tied to policy outcomes.¹⁸⁸

The possibility of selecting an ideal venue is of course constrained by the availability of venues. Issues such as human rights or broad environmental problems may be pursued across a number of venues, allowing activists to select venues which best fit with their goals. However this may not always be the case. Some issues lack venues, or are limited to a single venue, such as many of the issues upon which the SSCS campaigns, particularly whaling, which is managed exclusively by the IWC. Having a limited number of possible venues within which to pursue an

¹⁸⁰ Emphasis added, Kolb 2005:115; see also Rootes 2005:22; Sikkink 2005:164; Tarrow and Della Porta 2005:236; O’Neill 2004:237; Tarrow 2001; Bramble and Porter 1992:346.

¹⁸¹ Tarrow 2005:26 citing Martin and Simmons 1999:106; see also Tilly and Tarrow 2007:172; and Tarrow 2001:15.

¹⁸² Khagram, Riker and Sikkink 2002:18; and see O’Neill 2004:237; Tarrow 1999.

¹⁸³ Slaughter 2000a:104.

¹⁸⁴ Pralle 2006:26; and see Pralle 2003:242.

¹⁸⁵ Pralle 2003:233.

¹⁸⁶ Sikkink and Smith 2002:34; see also Keck and Sikkink 1999:95; Keck and Sikkink 1998.

¹⁸⁷ Pralle 2003:234.

¹⁸⁸ *Ibid.*, p.240.

issue is not a unique situation by any means, but creative solutions to this challenge remain few. As we will see, the IWC is far from an ideal venue. At best it is mired in a longstanding deadlock. At worst it is a critically flawed and impotent organization and one which is incapable of making the changes necessary to rectify this predicament. Understanding the SSCS's strategy therefore may shed light on how activists craft strategies which work when existing institutions are ineffectual.

2.3.2 - Typologies of Action

In their seminal book, *Activists Beyond Borders*, Keck and Sikkink classify activists' broader strategic repertoires into a typology of four categories: 1) information politics; 2) symbolic politics; 3) leverage politics, and 4) accountability politics.¹⁸⁹ Within each of these categories are a range of potential actions. Before examining these, it is important to note that there is considerable overlap amongst the categories. For example while the release of a scientific report might be considered as information politics, this information might serve to leverage an important actor or shame a non-compliant one, and the information may be released through the use of a symbolic image event. Activists cannot rely on a single method alone: an organization which monitors state compliance with treaties will still need to communicate their findings to the public and use various other forms of information and symbolic politics to generate support and funding from donors and attention for their cause.

While multiple methods may be combined, organizations do not tend to embrace all strategies with equal fervor. Over time, they develop preferred approaches based on their assessment of the relative costs and benefits of employing particular tactics. Groups develop structure and organizational models which support preferred strategies, gradually developing a repertoire.¹⁹⁰ Thus over time an organization (or TAG) tends to rely on a particular repertoire of action which may include elements from multiple categories. Organizations do not operate in isolation, especially those which are part of a TAG. Many organizations carve out an operational niche somewhere along the spectrum of possible actions. A campaign can include the actions of

¹⁸⁹ Keck and Sikkink 1999:95; and Keck and Sikkink 1998:16;.

¹⁹⁰ Tilly and Tarrow 2007:4.

groups with different repertoires along Fassin's spectrum, and combine various elements from Keck and Sikkink's different categories.¹⁹¹ Organizations may work in cooperation as part of a TAG, in parallel or even in opposition to one another.

2.3.2.1 - Information Politics

The key currency of INGOs/TAGs is information, and the literature singles out 'information politics' as the preeminent function of these actors.¹⁹² Keck and Sikkink define 'information politics' as "the ability to quickly and credibly generate politically useable information and move it to where it will have the most impact."¹⁹³ Activists typically employ soft power, and exercise this soft power by "proposing, questioning, criticizing and publicizing," which entails information gathering, dissemination, evaluation and certification.¹⁹⁴ Activists use information politics at all stages of the international policy process. Transnational activists influence policy by calling attention to issues and by using information strategically to shape the way individual policy-makers perceive of problems (framing in 2.3.2.2 – Symbolic Politics, below).¹⁹⁵ Activists also play a crucial role as suppliers of technical knowledge and expertise. Many transnational issues are characterized by pronounced uncertainty, allowing activists to exert influence simply by supplying credible information as to the nature of a problem and its possible solutions.¹⁹⁶

Epistemic networks play an important role in the transmission of information and the creation of knowledge.¹⁹⁷ On environmental issues, groups of experts and scientists are often given a very prominent role in negotiations, "bridging the gap between science and politics, facts and values."¹⁹⁸ Information politics is pervasive even across repertoires of action.¹⁹⁹ Information is used by virtually all activists during campaigns, if only to serve as justification for the use of

¹⁹¹ Fassin 2009:511-512.

¹⁹² Eilstrup-Sangiovanni and Phelps Bondaroff 2014; Nelson 2002b; Betsill and Corell 2001:74; Keck and Sikkink 1998:x; Raustiala 1997:726; and Eyerman and Jamison 1989.

¹⁹³ Keck and Sikkink 1998:16; and see Keck and Sikkink 1999:95.

¹⁹⁴ Sikkink 2002:305 citing Dryzek 1999.

¹⁹⁵ See Keck and Sikkink 1998:x.

¹⁹⁶ Betsill and Corell 2001:66.

¹⁹⁷ See for example Jasanoff 1997:581.

¹⁹⁸ Blok 2011:59.

¹⁹⁹ Keck and Sikkink 1998:19, 17.

other, potentially more confrontational, repertoires. The SSCS constantly employs information politics, using information to justify its actions, to frame actions as international law enforcement, to appeal to donors, leverage states and so on. But the SSCS certainly does not engage in its confrontational actions to bring attention to or to release specific information. Its use of information politics is certainly subservient to achieving other strategic objectives.

2.3.2.2 - Symbolic Politics

‘Symbolic politics’ refers to the ability of activists to “call upon symbols, actions, or stories” creating awareness of issues and to make said issues comprehensible to an international audience.²⁰⁰ It is the “human effort to induce cooperation through the use of symbols.”²⁰¹ One of the most powerful non-material resources available to activists is “their ability to define and redefine issues.”²⁰² This serves to expand the scope of conflicts, get issues onto the agenda, shift issues into more amenable venues, and ultimately to change public policy. Wapner describes this process as ‘cultural politics,’²⁰³ where through the use of symbols and framing, activists attempt to alter “the norm structure of global governance.”²⁰⁴ Activists use symbolic politics at all levels of international policy. In the agenda setting phase, activists often serve as ‘norm entrepreneurs’ who “call attention to issues or even ‘create’ issues by using language that names, interprets, and dramatizes them.”²⁰⁵ Norm entrepreneurs seek to introduce new norms to the international community, and use symbols and frames to define a problem, to articulate a blame story (a causal chain), to suggest desirable solutions, and to motivate action around the problem.²⁰⁶ Keck and Sikkink highlight the importance of the establishment of a causal story, which serves to identify the cause of a problem or injustice.²⁰⁷

The process of defining, re-defining, interpreting, reinterpreting, naming or renaming is known as ‘framing.’ Symbolic politics involves the constant framing and re-framing of issues.

²⁰⁰ *Ibid.* p.16; and see Keck and Sikkink 1999:95 referencing Brysk 1994.

²⁰¹ DeLuca 1999:16, citing Brock, Scott, and Chesebro 1989:14.

²⁰² Pralle 2006:6, citing Cobb and Elder 1972.

²⁰³ Wapner 2002:51.

²⁰⁴ Sikkink 2002:302; see also Joachim 2003:251, citing Zald 1996: 268; Slaughter 2000a:105; Keck and Sikkink 1998.

²⁰⁵ Finnemore and Sikkink 1998:897.

²⁰⁶ Yanacopulos 2009:72.

²⁰⁷ Keck and Sikkink 1998:27; see also Yanacopulos 2009:72.

Keck and Sikkink *inter alia* define framing as “the strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action.”²⁰⁸ Activists “deliberately package and frame policy ideas to convince each other as well as the general public, that certain policy proposals constitute acceptable solutions to pressing problems.”²⁰⁹ Activists select and construct frames which resonate with ‘familiar cultural themes.’²¹⁰ Keck and Sikkink argue, “one of the main tasks that social movements undertake... is to make possible the previously unimaginable, by framing problems in such a way that their solution comes to appear inevitable.”²¹¹ And activists’ efforts at framing can be seen during negotiations, and in the policy implementation and monitoring phase, whereby activists can frame non-compliance in such a way as to place greater pressure on norm violators and by doing so attempt to leverage compliance. Framing can be used as a means of scaling issues into the international arena. Activists seeking upward scale shift will attempt to mobilize “international symbols to frame domestic conflicts,”²¹² thereby taking advantage of international norms. Re-framing issues using different sets of norms can help bring those issues to the attention of ‘hospitable’ audiences that are often distant both geographically and politically.

ENGOS and ETAGs face a challenge when campaigning on environmental issues, for as Keck and Sikkink note, “environmentalism is less a set of universally agreed upon principles than it is a frame within which the relations among a variety of claims about resource use, property, rights, and power may be reconfigured.”²¹³ As such, environmental campaigners will often benefit by presenting a ‘human face,’ in the form of human rights and/or development issues, to environmental issues, in order to turn them into principled issues.²¹⁴ In doing so however environmentalists risk potential backlash because framing issues from a ‘human perspective’ opens the issue to competing claims by disadvantaged groups.²¹⁵

Framing and symbolic politics are present not only in activists’ rhetoric, “but also through what they do – through their choices of tactics and the connections between their actions

²⁰⁸ Khagram, Riker and Sikkink 2002:12, citing Snow et al. 1986; see also Tarrow 2005:61 citing Gamson 1992; and Keck and Sikkink 1998:17.

²⁰⁹ Joachim 2003:250-251 citing Campbell, 1988:38; see also Pralle 2003:242.

²¹⁰ Ryan 1991:79 citing Gamson 1984:80; Thomas 2002:71; and Keck and Sikkink 1998:17.

²¹¹ Keck and Sikkink 1998:40-41.

²¹² Tarrow 2005:32.

²¹³ Keck and Sikkink 1998:121.

²¹⁴ *Ibid*, p.136-137.

²¹⁵ *Ibid*, p.121; and Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

and their rhetoric.”²¹⁶ IENGOS, notably Greenpeace, are well known for creating powerful images during their campaigns, which include activists dangling from banners, blocking effluent pipes, or zipping in front of whaling vessels. These acts are highly symbolic image events; what Hunter describes as ‘mind bombs’ – “influential, sometimes archetypal images that can cut through the hypnotic drone of the day-to-day babbling to reach people at a deeper emotional level.”²¹⁷ These mind bombs engender symbols through the images they create, and Greenpeace’s mind bombs are carefully constructed to resonate both with some dominant cultural norms while at the same time challenging others. Images of small, brightly coloured *zodiacs* darting in front of massive rusting whaling vessels evoke a ‘David-versus-Goliath’ spectacle, appealing to people’s desire to root for the underdog.²¹⁸ These events produce images highlighting “the utter vulnerability of protesters as they intervene on behalf of nature,”²¹⁹ and employ a mechanism described as ‘manufactured vulnerability.’²²⁰ With manufactured vulnerability, activists demonstrate “their own moral commitment for a media and public captured by the epic quality of the confrontation,” by exposing themselves to danger and putting their safety in the hands of the authorities.²²¹ Activists do “not oppose force with force,” but take the moral high ground by placing the responsibility for their “safety in the hands of the authorities.”²²² Such an action romanticizes the activists, contrasting with the “oppressive and aggressive activities of the State.”²²³

It is undeniable that the SSCS also engages in symbolic politics. The organization deploys its own ‘Jolly Roger’ pirate flag and its campaigns are replete with image events. However, unlike Greenpeace actions, creating a powerful ‘mind bomb’ does not appear to be the ultimate goal of SSCS actions. The SSCS regularly engages in actions which make for very poor image events, either because no/poor images are produced (such as night actions), or the images which are produced lack certain qualities which make them effective mind bombs. For example, aggressive action, coupled with such imposing visual factors as black vessels and uniforms, does

²¹⁶ Khagram, Riker and Sikkink 2002:13 citing McAdam 1996:354.

²¹⁷ Hunter 2004, citing Hunter 1972; see also Dale 1996.

²¹⁸ DeLuca 1999:53, citing Hunter 1979:229; see also Dale 1996:18.

²¹⁹ DeLuca 1999:55; see also Letcher 2003:72; Doherty 2000; Dale 1996:18.

²²⁰ Doherty, Paterson, and Seel 2000:2; and see Hayes 2008; Doherty 2000:70.

²²¹ Doherty 2000:70, 71; see also Letcher 2003:72; Doherty, Paterson, and Seel 2000:2; DeLuca 1999:55; Dale 1996:18.

²²² Doherty 2000:71.

²²³ Anderson 2004:118 citing Pork Bolter 2000; Evans 1998.

not foster an image of vulnerability. In engaging confrontationally and aggressively, the SSCS jettisons the moral high ground associated with the underdog/vulnerable/‘peaceful hippy’ image portrayed by Greenpeace (through the use of brightly-coloured rainbow-festooned vessels and activists) and instead embraces piratical and legal symbolism. SSCS image events therefore challenge what the literature generally considers as effective image events, with the production of image events appearing secondary to the goal of directly stopping Japanese whaling. The SSCS frames its actions differently than other IENGOS/ETAGs. The SSCS’s principal argument is not that what the Japanese are doing is wrong, but that it is illegal. The SSCS appears to be attempting to re-frame the whaling issue from normative to legal. This is not to suggest that the SSCS does not use normative arguments/framing, but that these are secondary to legal framing and rhetoric.

2.3.2.3 - Leverage Politics

Keck and Sikkink define leverage politics as “the ability to call upon powerful actors to effect a situation where weaker members of a network are unlikely to have influence.”²²⁴ They identify two forms of leverage, material leverage and moral leverage, explaining that “[m]aterial leverage usually takes the form of some kinds of issue-linkage, normally involving money or goods (but potentially also including votes in international organizations, prestigious offices, or other benefits).”²²⁵ Activists most often seek to achieve material leverage by threatening to harm the economic interests of states or other relevant actors.²²⁶ For example, activists can organize consumer boycotts of services or products, promote divestment programs, or disrupt shareholder meetings.²²⁷ States are leveraged indirectly through the targeting of specific industries, or activists can target companies directly.

Other kinds of material leverage involve acts of property damage or other aggressive acts, such as blockades, to interfere with economic activity. These types of strategies are seldom considered as part of the repertoires of INGOs/TAGs, and IR scholars may even define away

²²⁴ Keck and Sikkink 1998:16; and see Keck and Sikkink 1999:95; Wapner 1996:119.

²²⁵ Keck and Sikkink 1999:97.

²²⁶ Sasser et al. 2006:6.

²²⁷ See for example Betsill and Corell 2008:23; Finnemore and Sikkink 1998; Bramble and Porter 1992.

these ‘transgressive’ acts, relegating them to the repertoires of ‘uncivil society.’ These transgressive forms of material leverage are more commonly found in the repertoires of radical domestic organizations and movements. These shall be explored in greater detail in Chapter 6, however a general observation which can be made is that the INGO/TAG literature tends to ignore these more radical/confrontational/transgressive strategies.

An extensive literature has emerged documenting and exploring the manner in which activists use moral leverage to achieve desirable outcomes. Activists can use this moral authority to leverage other actors, what Keck and Sikkink and others describe as ‘mobilizing shame.’²²⁸ From a position of moral authority, and by releasing information, activists use strategies of ‘naming and shaming’ whereby they publicize instances of noncompliance by states which have made previous commitments, subjecting the non-compliant state to widespread international public scrutiny.²²⁹ Moral leverage first requires the existence of international norms, or standards of appropriate behavior.²³⁰ Norms become, as Thomas argues, “the preeminent vocabulary of international society, which both state and nonstate actors use to justify their existence, their goals, and their behavior.”²³¹ The more entrenched a norm becomes, the more effectively actors can use it as leverage. Activists can then use shame, drawing attention to non-compliance, noting “the distance between discourse and practice.”²³²

States are concerned with such efforts because they “value the legitimacy they gain by appearing to comply with international norms, and because they value the material goods that others may link to certain behaviors.”²³³ Concern over reputation is not only motivated by morals, but by a mixture of normative and material interests. Burgerman explains that states concern themselves with reputations for a combination of a “need for approval and acceptance in a community of states bound by shared values and the material influence that more powerful states can bring to bear on the offenders.”²³⁴ Non-compliance with norms can lead to “tangible political or economic sanctions.”²³⁵ All states are susceptible to this kind of pressure, though the

²²⁸ Epstein and Barclay 2013:99; Keck and Sikkink 1999:97; Keck and Sikkink 1998:23.

²²⁹ See Epstein and Barclay 2013:99; Murdie and Davis 2012; Hafner-Burton 2008; Price 2003:595; Keck and Sikkink 1999:97; Tarrow 1999.

²³⁰ Khagram, Riker and Sikkink 2002:16.

²³¹ Thomas 2002:72.

²³² Keck and Sikkink 1998:24.

²³³ Thomas 2002:72-73.

²³⁴ Burgerman 2001:8.

²³⁵ *Ibid.*

literature generally agrees that states which are most susceptible “are those that aspire to belong to a normative community of nations.”²³⁶ This has led some commentators to suggest that this strategy is most effective when it is least needed.²³⁷ The SSCS does not appear to ‘name and shame’ in the conventional sense: one could characterize what it does as more akin to ‘judging and acting.’ The organization does not point out disparities between discourse and practice with respect to norms. Rather, the SSCS points out violations of the law, failures to enforce the law, and acts to rectify this disparity.

2.3.2.4 - Accountability Politics

In a sense, Keck and Sikkink’s ‘accountability politics’ represents a marriage of information and leverage politics. They describe accountability politics as “the effort to hold powerful actors to their previously stated policies or principles.”²³⁸ Monitoring is carried out during the treaty making and implementation stages of the international policy making process.²³⁹ Once policy is enacted, activists monitor state compliance with treaties and agreements. They gather information and document instances of non-compliance, and then strategically disseminate this information “to ensure accountability with public statements, existing legislation and international standards.”²⁴⁰ Dai elaborates that “[b]y providing compliance information, they facilitate reciprocity and thus induce compliance.”²⁴¹

Not all are in agreement that INGOs and TAGs provide a service to states. Raustiala notes that INGOs and TAGs “remain imperfect monitoring agents, [as they are]... often less concerned with compliance in the narrow sense – adherence to the letter of an agreement – [than]... approval or disapproval of particular actions, even if those actions are not violations of the terms of the accord.”²⁴² He cites the case of whaling to support this, noting that activists continue to “criticize and monitor those nations engaged in legal research whaling or that had

²³⁶ Keck and Sikkink 1998:29; see also Burgerman 2001:15; Slaughter 2000a:106.

²³⁷ Sikkink 2002:312; see also Price 2003:593.

²³⁸ Keck and Sikkink 1998:16; and see Keck and Sikkink 1999:95.

²³⁹ Slaughter 2000a:102; see also Charnovitz 2006:355; Chayes and Chayes 1995:215.

²⁴⁰ Keck and Sikkink 1998:17; see also Wapner 2002:42; Raustiala 1997:729.

²⁴¹ Dai 2005:364.

²⁴² Raustiala 1997:729.

expressed reservations to particular agreements, despite the legality of their actions.”²⁴³ We shall return to this issue in greater detail in Chapter 4.2.4.

We can see complementarity between leverage and accountability politics. Activists monitor compliance, and once they have identified instances of non-compliance, they use ‘naming and shaming’ to compel states to change and become compliant. This method is used by INGOs and TAGs; from human rights TAGs, explored by Bergerman,²⁴⁴ to IENGOs as documented by Pralle, and Schofer and Hironaka.²⁴⁵ Pralle makes an interesting observation when she notes that

environmental activists also used international laws, treaties, and norms to shame [states]... These international laws and treaties, while devoid of any real enforcement power, provided a rich array of symbols and arguments to environmental groups, often adding legitimacy to their claims.²⁴⁶

This highlights the circumstance whereby even if states violate explicitly codified international laws or treaties, activists primarily use this as added moral legitimacy to their shaming efforts but these efforts remain symbolic and rhetorical. The SSCS appears to take this a step further, giving priority to legal rather than moral/normative justifications.

INGOs/TAGs play an important role in monitoring, but general consensus is that the role of INGOs and TAGs in enforcement is very limited. Bergerman distinguishes enforcement from “other degrees of pressure in that it involves binding international decisions and either military or nonmilitary coercion.”²⁴⁷ Lacking military might and authority, INGOs and TAGs are not considered to be viable enforcement actors. Bergerman claims that this is not in itself disadvantageous. In some instances enforcement actions by states may be politically or militarily unfeasible, which provides a niche for traditional INGO/TAG leverage and information politics.²⁴⁸ Another means by which activists can encourage or compel enforcement by states is through domestic legal systems. Dai, in particular, details the importance of domestic constituencies in assuring state compliance.²⁴⁹ Due to their transnational nature, INGOs and TAGs are well placed to engage in judicial arbitrage, searching out domestic legal venues and in

²⁴³ *Ibid.*

²⁴⁴ Burgerman 2001.

²⁴⁵ Pralle 2006; Schofer and Hironaka 2005.

²⁴⁶ Pralle 2006:127.

²⁴⁷ Burgerman 2001:19.

²⁴⁸ *Ibid.*, p.4.

²⁴⁹ Dai 2005:363.

pursuing non-compliant parties through these venues.²⁵⁰ The SSCS challenges the idea that NGOs cannot actively enforce international law. It presents an alternative to this type of moral leverage, presenting its own form of ‘legal leverage,’ and in so doing expands this area of the literature and our understanding of the mechanisms available to activists.

2.4 - Issue Selection

Given the range of strategies available to activists, two questions remain: how do activists decide which strategies to adopt, and how do activists select the issues upon which to campaign? While INGOs and TAGs are strategic actors, able to choose repertoires most likely to help achieve desired outcomes, they do not embrace all strategies with equal fervor. Many organizations shun confrontational or destructive approaches not on ground of efficacy but rather due to moral objections to the use of property destruction or violence. Strategies must also be carefully matched to political opportunity structures in order to achieve optimum effect: INGOs and TAGs cannot monitor treaties that do not exist, release information that is not available, or appeal to norms that have no resonance. Organizational structures, available resources, issues and venues can in turn reinforce choices of repertoires. The literature agrees that size matters. Arts notes that a NSAs is most relevant when “(1) its size is considerable, (2) its constituency is substantial and covers several countries, (3) governments and IGOs have granted it (in)formal access to political arenas and (4) it has shown that it is consequential to international politics.”²⁵¹ Large organizations are able to exercise a broader range of strategies, which puts them in a position to be more successful than smaller organizations.²⁵²

There is also the question of how INGOs/TAGs select the issues upon which they campaign and how they devise strategies to achieve specific goals. One basic assumption is that INGOs/TAGs select issues for purely ‘principled reasons’, in other words, based on their perceived moral exigency. Yet, as many scholars have pointed out, this fails to explain why some

²⁵⁰ See for example Wapner 2002:43.

²⁵¹ Arts 2003-2004:5, referencing Morss 1991.

²⁵² See for example Arts 2003-2004:5; Jasanoff 1997:588; Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

morally pressing issues are adopted while others are not.²⁵³ Clearly there are other factors which guide issue-selection beyond mere ‘moral urgency,’ or in the case of environmental issues, conservation significance. Explanations of issue-selection can be loosely divided into two broad categories, those which emphasize the particular characteristics or behavior of (I)NGOs/TAGs (agency-based explanations), and those explanations which highlight the importance of issue context and institutional setting, or ‘political opportunity structure’ (structural explanations).²⁵⁴

Structural explanations of issue-selection posit that issues are adopted due to specific attributes which make them more amenable to international advocacy.²⁵⁵ Keck and Sikkink identify two issue attributes which are most frequently selected by activists:

- (1) Those involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) about who bears responsibility;
- (2) Issues involving *legal* equality of opportunity.”²⁵⁶

They elaborate, noting that “[i]ssues that involve ideas about right and wrong are amenable to advocacy networking because they arouse strong feelings, allow networks to recruit volunteers and activists, and infuse meaning to these volunteer activities.”²⁵⁷ The importance of the moral resonance of an issue in line with existing international norms is also cited by Price as an important determinant of campaign success and therefore issue-selection.²⁵⁸

Keck and Sikkink’s emphasis on issues with short and clear causal chains is also supported by Nelson, who agrees, and notes that long causal chains present problems with framing.²⁵⁹ Often issues which contain “especially potent or symbolic cases,” are ideal, because symbolic cases can help “organize a plethora of information into a manageable narrative that can be packaged for the public.”²⁶⁰ Long causal stories can be shortened through the use of symbolic cases. Towards this end, environmentalists often use surrogate or flagship species – “popular, charismatic species that serve as symbols and rallying points to stimulate conservation awareness

²⁵³ See particularly Carpenter 2010; Carpenter 2007a; Carpenter 2007b; Betsill and Corell 2008:39-49; Price 2003; Khagram, Riker, and Sikkink 2002; Price 1998.

²⁵⁴ See Eilstrup-Sangiovanni and Phelps Bondaroff 2014; Betstill and Correll 2008:39.

²⁵⁵ See Carpenter 2007a:644; Bramble and Porter 1992:315.

²⁵⁶ Emphasis original, Keck and Sikkink 1999:98.

²⁵⁷ Keck and Sikkink 1998:26.

²⁵⁸ Price 1998.

²⁵⁹ Nelson 2002b:385.

²⁶⁰ Burgerman 2001:45.

and action.”²⁶¹ Flagship species, such as pandas, humpback whales, polar bears or tigers, serve as representatives for larger ecosystems and their less charismatic residents.²⁶² Other campaigns stress “the connection between protecting environments and protecting the often vulnerable people who live in them.”²⁶³ In contrast to structural arguments, other scholars have stressed the importance of agency when it comes to issue-selection. Finnemore and Sikkink highlight the importance of ‘norm entrepreneurs’ who push certain issues to international prominence.²⁶⁴ Others have also stressed the significance of domestic political structures, suggesting that strong civil society allies are vital to the success of transnational campaigns if the target of a campaign is a state.²⁶⁵

Both of these two broad explanatory categories has merit, and it is likely that INGOs/TAGs select the issues upon which they campaign based on a combination of the above factors, as well as available resources and regional specialities of the organization. Carpenter notes that existing explanations of issue-selection are theoretically insufficient, and points out that many issues with favourable characteristics are not selected, and likewise activists will frequently campaign on issues which lack any favourable characteristics whatsoever.²⁶⁶

The case of the SSCS is interesting in that some of the issues upon which it successfully campaigns lack the favourable characteristics which many scholars cite as being important, including favourable political opportunity structures. The SSCS’s campaign on bluefin tuna serves as such an example. The overharvesting of bluefin tuna is not clearly a ‘right’ or ‘wrong’ question, it lacks a human dimension, as well as a clear causal chain, and there are no clear identifiable perpetrators to be held to account. Tuna themselves lack the charismatic features which would allow them to serve as a flagship species, with norm entrepreneurs pushing for their conservation, and a receptive international audience. The only thing in place is an existing regulatory framework, allowing the issue of bluefin tuna conservation to be framed as ‘international law enforcement.’²⁶⁷ The SSCS’s apparent selection of some of the issues upon

²⁶¹ Clucas, McHugh and Caro 2008:1517 quoting Haywood 1995; see also Bowen-Jones and Entwistle 2002; Leader-Williams and Dublin 2000; Caro and O’Doherty 1999.

²⁶² See *inter alia* Cianfrani et al. 2011; Walpole and Leader-Williams 2002.

²⁶³ Keck and Sikkink 1998:27.

²⁶⁴ Carpenter 2007b:104; Bob 2005; Finnemore and Sikkink 1998.

²⁶⁵ See for example Bratman 2012; Price 2003:592-5; Keck and Sikkink 1998:12-3.

²⁶⁶ Carpenter 2010:103; and see Carpenter 2007b:100.

²⁶⁷ Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

which it campaigns based on the existence of pre-existing international law, is consistent with its strategy and presents additional theories contributing to the literature on issue selection.

2.5 - Sea Shepherd's Challenge to the INGO/TAG Literature

In consideration of the aforementioned issues, the literature generally agrees that the IENGOS/ETAGs that will be the most relevant and successful have the following characteristics, they are: 1) large in membership and have considerable available resources,²⁶⁸ 2) have a constituency which extends through several countries,²⁶⁹ 3) have been granted (in)formal access to institutions where they can employ insider strategies.²⁷⁰ Furthermore these IENGOS/ETAGs will, 4) campaign on issues with specific characteristics – issues which are amenable to having a human face put on them or which feature a charismatic flagship species, and 5) involve norms which are consistent with pre-existing international norms and which resonate with audiences.²⁷¹ Bramble and Bramble note that small IENGOS/ETAGs which are effective tend to be those which derive “influence primarily from scientific-technical or legal expertise.”²⁷² The structural context must also be permissive: 1) no major states must stand in strong opposition to the issue; 2) states involved must be concerned with their international reputation, or the material costs associated with damage to it, 3) domestic organizations must be active and form links with international ones.²⁷³

The SSCS presents a challenge to these predominant positions. It is a relatively small organization (both in membership and financial resources), working as an outsider, employing confrontational – or even transgressive – action, campaigning on issues which have few of the positive issue attributes. The SSCS confronts powerful states and, notably, has no links to domestic organizations. The organization seldom campaigns in domestic settings but operates in international waters. If the SSCS's apparent strategy could be classified into any of Keck and Sikkink's categories, it would most likely be seen as a combination of leverage and

²⁶⁸ Jasanoff 1997:588; and Bramble and Porter 1992:316, 317.

²⁶⁹ Bramble and Porter 1992:317.

²⁷⁰ See for example Arts 2003-2004:5.

²⁷¹ Charnovitz 2006:348.

²⁷² Bramble and Porter 1992:318.

²⁷³ Burgerman 1998:907; and see hypotheses regarding the effectiveness of conventional environmental campaigns in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

accountability politics. However the organization's form of leverage is much more direct than typical forms of material leverage. The SSCS does not seek to bring about indirect material leverage against its targets through the mobilization of the public; instead it exacts direct material costs to them. Rather than targeting norm violators, the SSCS targets law violators, and it does not use persuasion, moral or otherwise, nor does it seek to morally shame them with words and symbols. The SSCS appears to use confrontational action to bring about compliance with international conservation laws, which it considers are being violated.

From this review, it is evident that the SSCS strategy deviates significantly from the conventional understanding of INGO/TAG strategy, however, despite this the SSCS appears to have achieved notable successes. This clearly suggests that a study of SSCS strategy will expand the literature on a number of important fronts, and generally expand our understanding of how INGOs/TAGs influence and exert power in international affairs.

CHAPTER 3 – METHODOLOGY AND RESEARCH DESIGN

3.1 - The Case Study

It is clear that SSCS strategy challenges the existing IR literature on conventional INGO/TAG strategy. The SSCS serves as a case study, from which we can expand our understanding of the various strategies which NSAs use to exert power in international affairs. This chapter outlines the method which was used to discern SSCS strategy and the mechanisms which make it effective. It begins by developing the single-outlier case model which was used and justifies the specific case selected. The various methods which were used are explained, beginning with process tracing and including PO, interviews, triangulation, and counterfactuals. Details revealing how these methods work and the reasons for their selection are then developed. The chapter also outlines field work procedures; the steps taken to secure a position and to protect research subjects, the manner in which data was collected, and outlines some of the methodological challenges encountered. It concludes by discussing data analysis.

3.1.1 - Case Selection

Like all ETAGs, the SSCS uses a range of strategies, often employing many different strategies in a single campaign, and not necessarily employing aggressive confrontation in all of its campaigns. For example the SSCS supports anti-poaching operations in the Galapagos Marine Resources Reserve by providing members of the national park service with material and training, and recently supplied them with an AIS vessel tracking system.²⁷⁴ The ‘Cove Guardians’ in Taiji, Japan and ‘Dam Guardians’ in California, are almost entirely ‘bearing witness’ campaigns,

²⁷⁴ SSCS, “Sea Shepherd Officially Hands Over AIS System to Galapagos National Park Service,” June 6, 2012, available at <http://www.seashepherd.org/news-and-media/2012/06/06/sea-shepherd-officially-hands-over-ais-system-to-galapagos-national-park-service-1391> (accessed June 4, 2013); SSCS “Defending Galapagos,” available at <http://www.seashepherd.org/galapagos/> (accessed December 10, 2011); Field Journal, Cornelissen, who is also Director of SSCS Operations in the Galapagos, January 4, 2011.

where activists are present, to observe and document actions to which they are opposed.²⁷⁵ Rather than looking at all SSCS campaigns which involve confrontational action, it was determined that the most effective way of studying the SSCS strategy would be through an in-depth study of a single campaign, allowing for the examination of SSCS strategy as it is enacted over the course of an entire campaign, providing a comprehensive picture of SSCS actions.

Two campaigns presented themselves as potential case studies of the SSCS confrontational approach; the anti-whaling campaign in the Southern Ocean, and the bluefin tuna campaign in the Mediterranean ('Operation Blue Rage'). The SSCS's Antarctic anti-whaling campaign makes an excellent case study in the SSCS's use of confrontational action. The campaign has been ongoing since 2005 (with a pilot in 2002-2003). Operations are long, carried out during the Austral summer (December to March). The ongoing nature of the campaign and the extended duration of annual operations allow for an examination of the strategic interplay between the SSCS and Japanese whalers and the impact of SSCS actions. Compared to other SSCS campaigns, the anti-whaling operations are also relatively well-documented, and the campaign has received considerable media attention. Information gleaned from previous annual operations can be used to provide a picture of SSCS strategy over an extended period of time and help to rule out anachronisms of a single operation, while the rich description of actions gathered through fieldwork serves to reveal details of SSCS strategy which are not part of the public record from previous operations.

At the time that this study was initiated, the bluefin tuna campaign had not yet been launched. The bluefin tuna campaign also has several characteristics which render it less well suited as a primary case study. The SSCS has only engaged in two seasons of campaigning (2010 and 2011), and like the bluefin tuna fishing season, campaigns were relatively short (often less than a month), offering scant opportunity for sustained observation. The continuity of the campaign is in doubt, in so far as no campaigning occurred in 2012 or 2013. The 2011 campaign was severely disrupted due to complications resulting from the civil war in Libya, and as a result, was ended early.²⁷⁶ While these characteristics make the bluefin tuna campaign a less than ideal choice for a single case study for inductive investigation, the campaign does serve as a means by

²⁷⁵ See SSCS, "Cove Guardians," available at <http://www.seashepherd.org/dam-guardians/> (accessed June 4, 2013); Jim Clark, *The Cove*, Co-producer Olivia Ahnehan, Oceanic Preservation Society, Diamond Dogs, and Skyfish Films, 2009.

²⁷⁶ Field Journal, conversation with SSCS crewmember, July 10, 2011.

which to make evaluations of conclusions drawn from observations of the SSCS's anti-whaling campaign. The bluefin tuna campaign will therefore be used as a supplementary case study to test any theories developed from observations of the SSCS's anti-whaling campaign. The bluefin tuna case also contributed to the examination of SSCS issue selection. Whaling is an issue upon which the SSCS has campaigned since its inception; it is therefore difficult to clearly separate its historical focus on the issue in order to identify other factors which may have motivated it to campaign on Japanese whaling in the Southern Ocean specifically. The bluefin tuna issue on the other hand is an issue upon which the SSCS only recently decided to campaign, and one which has been selected from a range of other possibilities, and therefore provides valuable insight into the issue selection of the SSCS.

3.1.2 - Single Case Study

A case study is defined by Gerring as “an intensive study of a single unit with an aim to generalize across a larger set of units.”²⁷⁷ Case studies are well suited to inductive research, allowing “one to test a multitude of hypotheses in a rough-and-ready way,”²⁷⁸ and for producing an “in-depth understanding of a phenomenon and its context.”²⁷⁹ The goal of a case study, of course, is not only to understand the specific case under examination, but also to generalize from this case, and to generate potentially new hypotheses and theories from it.²⁸⁰ The principal benefit of the single case study is the rich data it provides. This data is invaluable to process tracing.²⁸¹ Darke, Shanks and Broadbent note that a

single case study is appropriate where it represents a critical case...where it is an extreme or unique case, or where it is a revelatory case...[and s]ingle cases allow researchers to investigate phenomenon in depth to provide rich description and understanding.²⁸²

²⁷⁷ Gerring 2004:341.

²⁷⁸ *Ibid.* p. 350, 349.

²⁷⁹ Darke, Shanks, and Broadbent 1998:275; Eisenhardt 1989:534.

²⁸⁰ Bennett and Elman 2006:473; Bennett 2004:30; and see *inter alia* Gerring 2004:350; Eisenhardt 1989:546; Becker 1958:652-653.

²⁸¹ Creswell and Miller 2000:128.

²⁸² Darke, Shanks, and Broadbent 1998:277 citing Yin 1994:38-40 and Walsham 1995.

Bennett further elaborates on the benefit of studying outlier cases, noting that such cases “can help inductively identify variables and hypotheses that have been left out of existing theories.”²⁸³

At the onset of this study the SSCS presented itself as an apparently unique case, with distinct revelatory possibilities. Because there are few groups which do precisely what the SSCS does, specifically (confrontational) marine conservation in international waters, the SSCS serves as an excellent outlier case.

The use of a single case study is not without challenges and detractors. One of the most significant risks of building theory from a single case study is that it “may result in narrow and idiosyncratic theory.”²⁸⁴ Generating theory which only describes the SSCS’s (anti-whaling) strategy would not go very far in providing insight into the larger matter of expanding our knowledge of the various ways in which NSAs seek to influence IR. A further risk of case study research is that

the intensive use of empirical evidence can yield theory which is overly complex. A hallmark of good theory is parsimony, but given the typically staggering volume of rich data, there is a temptation to build theory which tries to capture everything.²⁸⁵

Given the sheer volume of data generated throughout the course of this study, this was indeed a temptation, but one can guard against such an eventuality by aiming to generate parsimonious theory, a goal of the study. Gibb and Wilkins criticise Eisenhardt’s belief that the “more cases a researcher studies, the better (within certain limits) for generating theory,” arguing that an emphasis on a larger numbers of cases loses “the essence of case study research: the careful study of a single case that leads researchers to see new theoretical relationships and question old ones.”²⁸⁶ For these scholars, the risk of producing an idiosyncratic theory is far outweighed by the potential novelty and validity of theory generated from the sheer richness of data produced from a single case study.

Once a theory of SSCS anti-whaling strategy is developed, it will be tested against the bluefin tuna campaign, to verify that the theory is not idiosyncratic to the SSCS anti-whaling campaign. The bluefin tuna campaign will be studied in much the same way as the whaling campaign, but will rely more heavily on interviews with SSCS crew members and secondary

²⁸³ Bennett 2004:30.

²⁸⁴ Eisenhardt 1989:547.

²⁸⁵ *Ibid.*

²⁸⁶ Gibb Dyer and Wilkins 1991:614.

sources given the limitations of this campaign. ‘Most similar case’ comparison will also be used to further our understanding of SSCS strategy. In 2010 Greenpeace ran a concurrent bluefin tuna campaign which also allows for comparison between the strategies which the two organizations adopted. Such a comparison promises to highlight how SSCS strategy differs from that of one of the few other IENGOS which operates on the high seas. Any theory generated will also be compared to the actions of other IENGOS/ETAGs, to determine whether the theory is specific to the SSCS or if it can be used more broadly. Finally, I will consider whether the theory is specific to environmental campaigning, or whether it can apply to other (I)NGOs/TAGs and NSAs, thereby serving to expand our understanding of how NSAs exert power and influence in IR.

3.2 - Discerning SSCS Strategy

The next question is how to study the SSCS’s anti-whaling strategy in order to determine whether the strategy is effective and if so, what makes it effective? Within-case analysis will be used, because such a method is “aimed at the discovery and validation of causal mechanisms.”²⁸⁷ Causal mechanisms are defined as the “unobservable entities or structures that operate in specific contexts to generate the phenomena that we observe in the physical or social world.”²⁸⁸ Understanding the causal mechanism behind SSCS strategy is not dependent on this mechanism being consciously enacted through strategy. In other words, it could very well be the case that the SSCS perception of what it is doing and says it is doing, has little to do with the mechanisms which ultimately make its actions powerful, or that the SSCS may seek to accomplish certain outcomes, through the explicit and conscious use of certain mechanisms, while at the same time benefiting from other mechanisms not consciously enacted. Several methods have been chosen in order to uncover these mechanisms. Process tracing is used to identify a mechanism using information generated through PO and verified by triangulation. Counterfactuals will be used to measure the impact of SSCS actions, and the mechanisms behind them.²⁸⁹

²⁸⁷ Bennett and Elman 2006:459.

²⁸⁸ Bennett 2004:35.

²⁸⁹ Betsill and Corell 2001.

3.2.1 - Process Tracing

Process tracing involves “the minute tracing of the explanatory narrative to the point where the events to be explained are microscopic and the covering laws correspondingly more certain.”²⁹⁰ The goal of process tracing is “to assess causality by recording each element of the causal chain.”²⁹¹ Process tracing produces narratives which “allow us to capture the unfolding of social action over time in a manner sensitive to the order in which events occur.”²⁹² Rather than looking at a portion of a process, such as outcome, process tracing emphasizes studying an issue from its beginning to its conclusion.²⁹³ Bennett and Elman posit that “each process tracing account suggests evidence that should be found if the account is true,” and that “our confidence in the suggested explanation will be increased if process tracing finds evidence of observable implications that are inconsistent with alternative explanations.”²⁹⁴

Betsill and Corell note that process tracing is useful “for identifying the causal mechanisms by which NGOs exert influence.”²⁹⁵ It is a method which is also well suited to seeking to identify strategy. Process tracing “investigate[s] and explain[s] the *decision process* by which various initial conditions are translated into outcomes,”²⁹⁶ and it

attempts to uncover what stimuli the actors attend to; the decision process that makes use of these stimuli to arrive at decisions; the actual behavior that then occurs; the effect of other variables of interest on attention, processing, and behavior.²⁹⁷

Process tracing serves to uncover “actors’ preferences, their perceptions, their evaluation of alternatives, the information they possess, the expectations they form, the strategies they adopt, and the constraints that limit their actions.”²⁹⁸

In order to understand the mechanisms which drive SSCS strategy one must observe this strategy in action, throughout the course of its implementation. From looking at available

²⁹⁰ Roberts 1996:66; and see Collier 2011:824; Gerring 2004:348.

²⁹¹ Betsil and Corell 2001:71.

²⁹² Falleti 2010, citing Aminzade 1993:108.

²⁹³ Bennett and Elman 2006:459.

²⁹⁴ *Ibid.* p. 460; see also Bennett 2004:36.

²⁹⁵ Betsill and Corell 2001:71; and see Collier 2011:824; Falleti 2010; Gerring 2004:349; Zürn 1998:646-647.

²⁹⁶ Falleti 2006:10, citing George and McKeown 1985:35, emphasis Falleti.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.* p.11, citing Bates et al. 1998:11.

sources, it is difficult to discern intentional strategy from post-facto justification. It is unclear whether a particular outcome is the result of mechanisms triggered by SSCS strategy, luck, or outside factors. There is also the desire to identify all of the mechanisms involved in SSCS strategy, not just those which are visible to the public and which the organization publicly declares as important. The fieldwork component of this study seeks to follow the entirety of an SSCS campaign, and to track the impact of this campaign through observation of a subsequent meeting of the IWC and by examining the impact of the campaign on Japanese whaling operations. Studying an SSCS campaign in the detail and proximity required for process tracing recommends the use of PO.

3.2.2 - Participant Observation

PO was conducted on board the SSCS vessel the *Bob Barker*, as it participated in ‘Operation No Compromise,’ from December 2, 2010 to March 6, 2011. PO involves the researcher living with and participating in the everyday activities of those being studied.²⁹⁹ The ultimate goal of PO is for the researcher “to develop a holistic understanding of the phenomena under study that is as objective and accurate as possible given the limitations of the method.”³⁰⁰ The researcher does this by observing the phenomenon from the position of both an insider and an outsider.³⁰¹ The participant observer functions along a continuum, ranging from complete observer to complete participant. The researcher negotiates his/her way along this continuum throughout the research process, bearing in mind that the “more you participate, the less you are able to observe, and vice versa.”³⁰² Also it is necessary to be mindful that to become a pure participant is to ‘go native’ or ‘become the phenomena,’ and thereby to abandon the research entirely. Similarly, to exclusively engage in observation, is not reaping the full benefits that PO has to offer.³⁰³

²⁹⁹ Bourdieu 2003:281; see also Becker 1958:652; Schwartz and Green Schwartz 1955:344.

³⁰⁰ Dewalt and Dewalt 2002:92.

³⁰¹ Dewalt and Dewalt 2002:4; Jorgensen 1989:14.

³⁰² Jorgensen 1989:55; and see Dewalt and Dewalt 2002:18; Atkinson and Hammersley 1994:248 citing Gold 1958, and Junker 1960; Schwartz and Green Schwartz 1955:347.

³⁰³ Dewalt and Dewalt 2002:18.

The use of PO assists in overcoming some of the challenges inherent in studying the SSCS. PO is a primary data gathering method and it answers the very real need for reliable information concerning the SSCS. As we have seen in the review of SSCS literature (see Chapter 1.5), there are problems with reliability of primary and movement information. This information also lacks detail with respect to the actual workings of SSCS strategy, in so far as it is released to accomplish specific campaign objectives. As with all politicized information, reliability is very low. This also includes information released by the Institute of Cetacean Research (ICR), the body which conducts the Japanese Research Whaling Program in the Antarctic (JARPA).

As far as media and secondary sources are concerned, reliability is also dubious. SSCS anti-whaling operations take place in one of the most remote locations in the world, and as such media observers must rely on information and reports of actions filtered through either the SSCS or the Japanese government/ICR. Both of these agents put their own, often conflicting, spin on these reports. For example in the most recent campaign ('Operation Zero Tolerance', 2012-2013), an ICR press release following a collision incident was entitled "Sea Shepherd vessels sabotage *Nisshin Maru* refueling and provoke collisions."³⁰⁴ While the SSCS's press release was titled "Japanese whale poaching vessel, *Nisshin Maru*, rams S. Korean fuel tanker, Sea Shepherd ships *Sam Simon*, *Steve Irwin*, and *Bob Barker*."³⁰⁵ Media reports based on these press releases and accompanying footage are clearly prone to distortion and cannot be relied upon. Academic studies of SSCS actions, their strategy or legality, are often based on these less-than-reliable sources of information. PO served as a means of addressing this problem. Being present on a campaign allowed me to observe events as they transpired, unfiltered. As Jorgensen notes PO is well suited to the study of phenomenon which are "somehow obscured from the view of outsiders."³⁰⁶ This study serves as the only known academic study of the SSCS involving the use of PO.

³⁰⁴ ICR, "Sea Shepherd vessels sabotage *Nisshin Maru* refueling and provoke collisions," February 20, 2013, available at <http://www.icrwhale.org/pdf/130220ReleaseENG.pdf> (accessed June 6, 2013).

³⁰⁵ SSCS, "Japanese Whale Poaching Vessel, *Nisshin Maru*, Rams S. Korean Fuel Tanker, Sea Shepherd Ships *Sam Simon*, *Steve Irwin*, and *Bob Barker*," February 20, 2013, available at <http://www.seashepherd.org.au/news-and-media/2013/02/20/japanese-whale-poaching-vessel-nisshin-maru-rams-s-korean-fuel-tanker-sea-shepherd-ships-sam-simon-s-1501> (accessed June 6, 2013); see also ABC News, "Vision Highlights High Stakes of Anti-whaling Operations," February 26, 2013, available at <http://www.abc.net.au/7.30/content/2013/s3698983.htm> (accessed June 7, 2013).

³⁰⁶ Jorgensen 1989:12-13.

PO was also selected to overcome the challenges relating to the use of interviews. Generally speaking, PO allows one “to check description against fact and, noting discrepancies, become aware of systematic distortions made by the person under study,” distortions which would be difficult to identify through interviews alone.³⁰⁷ Most media interviews with the SSCS are conducted with senior volunteers, and typically with Watson, as a result of the organization’s media policy. All volunteers are required to sign a ‘SSCS Media Policy and Procedure Agreement’ which, among other things, stipulates that “Captain Paul Watson is the primary Sea Shepherd media representative.... [and that] Neither volunteers nor office staff may function as media representatives without express written permission from the Media Director and/or CEO, Deputy CEO, or President.”³⁰⁸ A general mantra within the SSCS, repeated in *Earth Force!*, is “nobody talks, everybody walks” (see Appendix 1).³⁰⁹ SSCS crew members are renowned for their ability to follow this slogan. For example, videos and statements were released of the first officer of the *Bob Barker*, Peter Hammarstedt’s 2008 interrogation with the Canadian RCMP, during which he remained silent for the entire duration of a 4 hour interview.³¹⁰ Scholars seeking to interview crew members have found that SSCS volunteers carefully adhere to this agreement and practice. Stuart et al. found that “members were clearly influenced by the ideological and mission statements of SSCS leader Watson, often citing him specifically and repeating some of his phrases to explain or manage aspects of their beliefs.”³¹¹ Stuart et al. also found that the fact that interviews were conducted with an ‘outsider’ altered participants response and “plausibly resulted in greater defensiveness.”³¹²

I held a preliminary interview with Watson in September 2009 which confirmed that very little information would be released through an interview to an outsider. At the time, Watson spoke almost exclusively in sound bites identical to those from his numerous television and radio interviews, often verbatim.³¹³

³⁰⁷ Becker and Geer 1957:31.

³⁰⁸ SSCS, ‘Media Policy and Procedure Agreement,’ 2010.

³⁰⁹ See Watson 1993d:38; and SSCS, “Nobody Talks, Everybody Walks,” May 16, 2009, available at <http://www.seashepherd.org/commentary-and-editorials/2009/05/16/nobody-talks-everybody-walks-159> (accessed September 10, 2013).

³¹⁰ *Ibid.*; Hammarstedt 2011; Field Journal, Hammarstedt, December 18, 2010; Cornelissen, December 12, 2010 and February 4, 2011.

³¹¹ Stuart et al. 2013:21.

³¹² *Ibid.*

³¹³ Watson, September 16, 2009; and see Field Journal conversation with Watson, November 26, 2010; and crew commentary, January 11, 2011.

Due to the controversial nature of SSCS and its actions, the organization cloaks itself in secrecy. There are security reasons for this, because the release of certain information could jeopardize operational effectiveness. Like any ‘deviant subculture,’ members are naturally guarded with regards to outsiders. Dewalt and Dewalt note that PO is often the only viable approach to studying ‘deviant subcultures,’ where “long-term participation in the setting was the only possible way to gain enough of the trust of participants to carry out research.”³¹⁴ This explains why PO has often been used by scholars seeking to study radical environmental groups.³¹⁵ Building trust is important, as crew members are naturally distrustful of outsiders; at one point I was asked outright if I was a spy.³¹⁶

Shared experience aids in the formation of bonds of trust between the subject and researcher, which, over time, further increases disclosure. Lengthy study increases the likelihood of a researcher being considered non-threatening or being taken for granted, increasing disclosure and reducing the influence of the observer effect, which is the unavoidable impact that the observer and their act of observing has on the behavior of those being observed.³¹⁷

PO also allows a researcher to “carry on a conversation running over weeks and months with the people,” permitting the follow-up of issues at later dates when circumstances may be more conducive to disclosure.³¹⁸ Persistent close contact provides sufficient familiarity with research subjects to conduct future interviews. The extended nature of PO allows the researcher to compare responses and actions over time, and to engage in embedded process tracing.³¹⁹ Ultimately, sustained PO “increases the odds that researchers will uncover meaningful indicators of those patterns,” allowing the researcher to look for recurrence and consistency.³²⁰

PO is not without its drawbacks. Buroway notes that while PO “brings insight through proximity,” it does so “at the cost of distortion....Even the most passive observer produces ripples worthy of examination.”³²¹ The observer effect can be mitigated through extended observation; similarly the researcher should take into consideration the fact that he is “an integral part of the situation he is observing. He is linked with the observed in a reciprocal process of

³¹⁴ Dewalt and Dewalt 2002:10, 40; see also Sluka 1990; Jorgensen 1989:12-13.

³¹⁵ See *inter alia* Ingalsbee 1996:267; Lange 1990:477.

³¹⁶ Field Journal, crew member, November 24, 2010.

³¹⁷ Jorgensen 1989:58; and see Schwartz and Green Schwartz 1955:346.

³¹⁸ Becker and Geer 1957:31; and see Jorgensen 1989:13-14.

³¹⁹ Becker and Geer 1957:32.

³²⁰ Barley 1990:232, 228.

³²¹ Burawoy 1998:16-17.

mutual modification.”³²² There are further risks, well documented in PO literature.³²³ These include the fact that the “researcher’s own beliefs, values and prior assumptions...may prevent adequate investigation and consideration of possible contradictory data and unduly influence the analysis of the case study evidence.”³²⁴ Here it should be disclosed that I did not have a neutral position at the onset of the project. I am conservationist, do not generally support whaling, and initiated this project, at least partially, with an aim of improving (I)ENGO and ETAG strategy. A position of true neutrality is highly unlikely on an issue as controversial as whaling. However this kind of positionality is not considered harmful to the study. One’s preference for black or white pieces ought to make no difference to the study of strategies in chess. Furthermore the general desire to produce what Bevington and Dixon call movement-relevant theory, does not negatively impact findings; rather “the researcher’s connection to the movement provides important incentives to produce more accurate information, regardless of whether the researcher is studying a favoured movement or its opponents.”³²⁵ While being connected to the movement is valuable, a researcher must be careful to keep some distance to avoid ‘going native.’ Likewise ‘over-rapport’ with subjects should be avoided as close relationships may preclude investigation into certain questions without damaging that relationship.³²⁶ One effect that engaging in PO with the SSCS had on the research, was that it limited the ability to access Japanese officials and sources.

3.2.3 - Triangulation

Triangulation is a method which relies on “the use of multiple data types, sources, and methodologies,” and is typically recommended to theory-building researchers.³²⁷ This method relies upon the use of multiple data collection methods in order to ensure the validity and reliability of the data, and therefore any conclusions drawn from the data gathered.³²⁸ Researchers use triangulation to search for “convergence among multiple and different sources

³²² Schwartz and Green Schwartz 1955:346.

³²³ See *inter alia* Dewalt and Dewalt 2002:26 citing Horowitz 1996:43; and see Jorgensen 1989:45.

³²⁴ Darke, Shanks, and Broadbent 1998:285-286.

³²⁵ Bevington and Dixon 2005:190.

³²⁶ Barley 1990:240; Jorgensen 1989:62.

³²⁷ Betsill and Corell 2001:78; see also Miles and Huberman 1994; Eisenhardt 1989:537; Mathison 1988:13.

³²⁸ Eisenhardt 1989:538; and see Mathison 1988:13.

of information to form themes or categories in a study.”³²⁹ Triangulation helps guard against biases in both collection and analysis, through the use of “multiple sources of evidence... to provide multiple instances from difference sources... The case study findings are strengthened by the convergence of information from a variety of sources, providing multiple measures of the same phenomenon.”³³⁰ Dewalt and Dewalt note, that “[i]nsights gained through participant observation can be cross-checked through the appropriate use of other methods.”³³¹ Denzin outlines four types of triangulation: “(a) data triangulation including time, space, and person, (b) investigator triangulation, (c) theory triangulation, and (d) methodological triangulation.”³³² Apart from investigator triangulation, which was not possible due to a range of limitations, the project uses aspects of the other three types of triangulation in order to add validity to data and ultimately to the conclusions drawn.

3.2.4 - Counterfactuals

This project seeks not only to understand the mechanisms behind SSCS strategy, but also to determine whether these mechanisms are ultimately effective. The data generated through PO and verified through triangulation, feeds process tracing, allowing for the identification of causal mechanisms. Counterfactual analysis was used to evaluate the impact of those causal mechanisms. The counterfactual approach, in essence, “looks to compare similar worlds and asks whether differences between them can be attributed to a change in a particular cause.”³³³ Betsill and Corell conceive of counterfactual analysis as “an ‘imaginative construct’ that considers what *might* have happened if one examined variable were removed from the chain of events.”³³⁴ It serves the purpose of helping to rule out alternative explanations, by having the researcher ask if an ENGO/ETAG had not campaigned on an issue, would the outcome and/or process have been

³²⁹ Creswell and Miller 2000:126; and see Mathison 1988:13.

³³⁰ Darke, Shanks, and Broadbent 1998:286, referencing Yin 1994:92.

³³¹ Dewalt and Dewalt 2002:102.

³³² Mathison 1988:14 citing Denzin 294-307; Creswell and Miller 2000:126-127.

³³³ Bennett and Elman 2006:457; see also Gerring 2004:344.

³³⁴ Emphasis original, Betsill and Corell 2001:78.

different? If the outcomes would have been the same without ENGO/ETAG participation, this is an indication that ENGO/ETAG influence is low.³³⁵

The SSCS's anti-whaling campaign is particularly amenable to counterfactual analysis. The Japanese have been engaging in 'research' whaling in the Southern Ocean since 1988, and publish annual JARPA cruise reports, documenting the details of the expedition, including kill numbers and even the number of days of hunting lost to harassment by activists. This is one means of measuring impact, but analysis of this information can be taken further. Japan sets specific quotas of whales to be killed each season. Years without activist harassment serve as baselines, which can then be compared to the kill numbers for years when harassment occurred. One can also observe state behavior; observations of how states behaved prior to the SSCS campaign is indicative of how one might have expected them to continue to act in the absence of an SSCS campaign (the counterfactual), which in turn can be compared to how states have actually reacted to the SSCS campaign.

3.3 - Field Work

3.3.1- Preparation:

Contact with the SSCS was arranged through a third party, who put me in communication with a SSCS crew member with whom I arranged an initial meeting, which included a preliminary interview with Watson. A position on a SSCS vessel was secured following this initial contact. I submitted a general 'crew application,' which noted that the principal purpose of applying to crew a SSCS vessel was to engage in PO. The crew application included a 'Research Plan,' and a copy of the 'Consent Form.' In order to avoid introducing unnecessary bias, a description of the project's research aims was left intentionally vague. The application was accepted, however, the SSCS requires all crew members to sign confidentiality agreements, which could have frustrated the use of data gathered during fieldwork. Legal counsel was sought and an alternative confidentiality agreement was decided upon. This final agreement is not without its constraints upon open research, as it requires that a final draft of the study be

³³⁵ *Ibid.*

submitted to the SSCS prior to publication, so that it may verify that the study did not contain information which would damage the SSCS, its future operations, or interests.

In so far as the confidentiality agreement was the only hurdle to engaging in the fieldwork, it was decided that I should agree to abide by it, but take measures which would allow me the use of information that was vital to the thesis, while upholding research ethics and preventing harm to research subjects and the organization. The following measures, which were approved by the Department Degree Committee, were therefore taken. All potentially damaging or confidential information would be assigned to appendices so that it could be referred to in the text without its content being revealed. Efforts were undertaken to ensure that only necessary information was included in the appendices. The final draft of the thesis including appendices would be submitted to examiners for evaluation. Following examination, all appendices would be removed from the final publically available version of the thesis, and replaced with an annotation indicating that the information has been approved for restriction but had been made available to the examiners at the time of examination. In this way, only examiners would be privy to the confidential information, thereby protecting research subjects.

The fieldwork was also subject to extensive risk assessment, and dangers to the researcher and research subjects were identified. In order to mitigate some of the risks, as well as to bolster the application to crew, I undertook extensive sailing training. This training was also aimed at increasing the validity and quality of the data I gathered, as it ensured that over the course of the fieldwork I could concentrate on gathering data, rather than learning to sail.

I also took steps to uphold research ethics and to protect the subjects involved in the study. The ethical obligation not to harm research subjects was given precedence over any research goals.³³⁶ All subjects on the vessel were informed of the project in a short presentation at the onset of the campaign, and copies of the 'Research Plan' were made available on the crew bulletin board. All crew members were given an opportunity to provide written consent to have their identities and comments cited in the final project via a 'Consent Form,' and they were permitted to select varying degrees of anonymity. Throughout the study, crew members are referred to by a name which reflects the level of anonymity they selected, as either: 'crew member,' first name only, or full name. All members of the vessel, including members of the film crew were given consent forms, and all but one provided written consent over the course of

³³⁶ Dewalt and Dewalt 2002:44.

the fieldwork (one member provided oral consent and instructions to protect his/her identity). While some subjects chose various degrees of anonymity, the researcher's field notes were not anonymized, and so care was taken to ensure that these notes were not read by others, including the authorities, where appropriate.³³⁷

3.3.2 - *The Process*

Understanding how data was gathered is important to understanding the data and its analysis. I took jot notes continuously throughout my participation on board the vessel, that is, short *aides mémoire*, sometimes accompanied by diagrams or more detailed accounts. Jot notes were then transferred into two journals: the 'Daily Actions Log,' and the 'Field Journal.' The 'Daily Action Log' served as a chronological record of daily events, including actions, and noted the ship's position at noon and during engagements. The 'Field Journal' consisted of a more detailed account of key actions, summaries of conversations with crew members, preliminary analysis, and ideas for follow-up questions as well as questions for informal interviews and personal reflection. Both the 'Daily Action Log' and the 'Field Journal' were recorded as soon after events as possible in order to keep the information rich and reliable. As conversations were typically recorded some time after they occurred, the ability to generate verbatim quotes was considerably limited. I was able to make verbatim records of some crew meetings and briefings, as well as during some of the informal interviews. However it was found that the practicalities of living and working on board a vessel precluded verbatim recording. This accounts for the fact that there are few direct quotes from the fieldwork, and why the field notes are often cited without being attributed to a specific crew member.

There was a question as to whether notes should be recorded openly or covertly.³³⁸ It was important that crew members accept me in order that they feel open to sharing information, but also that I maintained some distance. Ultimately 'jot notes' were taken when possible, and always discretely. The 'Daily Action Log' and 'Field Journal' were written in public spaces on board the ship so that I would remain visible and accessible, and so that crew members did not

³³⁷ See Field Journal, concealing research notes, March 3, 2011.

³³⁸ *Ibid.* p. 204.

think of my research as secretive in nature. The result was that I was often joined by crew members while working on my notes, which provided me with excellent opportunities for directed conversations.³³⁹

3.3.3 - IWC Jersey

I attended the 63rd meeting of the IWC (July 11-14, 2011), serving as a journalist. Here I observed the meeting and held informal conversations with delegates and NGOs during breaks and after sessions. The information gathered in Jersey included the following:

- Impact of SSCS actions on the behaviour of states and the content of the meeting itself from watching committee sessions and circulating during breaks.
- Conversations with states and NGO delegates, journalists and lobbyists, on the workings of the IWC and the impact of the SSCS on the organization. Of particular interest were conversations with the Japanese English language lobbyists and representatives from IWMC World Conservation Trust, which provided the Japanese perspective on SSCS actions.
- Conversations with SSCS and other NGO activists outside of the meeting.

Through this informal process I was able to also arrange a formal interview with Gerard van Bohemen, the New Zealand Commissioner to the IWC, an interview which was recorded and transcribed. Access to other commissions, particularly the Japanese delegation was limited, although I did hold several informal conversations with an English-speaking Japanese spokesperson and with several pro-whaling lobbyists. Following the meeting, I conducted a formal interview with Dr. Simon Brockington, Secretary to the IWC on August 2, 2011, which was recorded and transcribed. I was also granted access to the IWC archives and collected copies of all documents making reference to the SSCS and to confrontational actions relating to anti-whaling activism, as well as transcripts of all of the speeches relating to the SSCS given at IWC meetings.

³³⁹ See for example Field Journal December 16 and 17, 2010.

3.3.4 - Methodological Challenges

The majority of challenges faced in the field were directly related to the nature of the environment in which the research was conducted. Most sources suggest that a researcher take some time out from the field during fieldwork as an opportunity to review findings outside of the research environment, allowing the researcher the possibility of gaining some perspective on the material away from the influences and distractions of the field.³⁴⁰ This was impossible given the circumstances of the campaign.

The best time for observing strategy and tactics was during ship to ship engagements, and small boat operations, however, as an active crew member, there was often limited opportunity to take notes during these times. Crew members were often barred from the bridge during engagements, which meant that I could seldom observe officers' decision-making first hand. In addition, as became apparent during the course of the campaign, a significant number of strategic decisions were made by Watson, who was captain of the *Steve Irwin* and therefore not present for direct observation. However, the implementation of these decisions could be directly observed. Constraints were also placed on communications: all off-ship communications (phone calls and e-mails) were monitored by the first mate.³⁴¹ Very limited access to materials in the field meant that triangulation could not be conducted during fieldwork.

The duration of the fieldwork was helpful in moderating the observer effect; however an additional factor served to magnify this effect, notably the filming of the television program *Whale Wars*. Cameras were a constant presence on the vessel, particularly during actions. Officers were particularly reticent to disclose valuable information and were constantly 'on message' in the presence of the cameras. I attempted to offset this effect by conducting some informal interviews and conversations at times when cameras were not rolling.

³⁴⁰ Dewalt and Dewalt 2002:74-75.

³⁴¹ See for example Field Journal December 10, 2010; and December 30, 2010.

3.4 - Analysis

3.4.1 - The Data

The result of the fieldwork was a collection of over 2000 pages of hand-written field notes containing information which included:

- A detailed chronology of the campaign. The actions and location of the *Bob Barker* were detailed, as well as those of other SSCS vessels when they were provided in crew briefings. I recorded the position of the *Bob Barker* at noon (ship's time) daily, and recorded the ship's position during actions (and see Appendix 2). This was particularly useful in determining in which jurisdiction the vessel was operating.
- Descriptions of crew briefings and training. The crew received regular briefings every morning which detailed recent events, news stories, and plans of actions. Some crew briefings were elaborate, particularly those prior to complicated actions, and diagrams were used to explain vessel movements and so on. The deck crew (where I was assigned) also had morning meetings where jobs were allocated and the details of any operations discussed. Deck crew members, as the team responsible for launching and recovering RIBs, preparing tactical devices (prop-foulers, butyric acid etc.), were provided with a clear picture of actions. This in turn provided a clear picture of the strategic significance of any specific action or tactic. Errors and accidents made by the crew also provided an excellent opportunity to observe the decision making of the officers.
- Reports on actions gathered from observations and debriefings with RIB crews. Actions involving the *Bob Barker* could be directly observed from where I was stationed as part of the stern defensive team. RIB actions could at times be observed, however many of these occurred at a considerable distance from the *Bob Barker*. Upon their return from an action, the crews of the RIBs would be debriefed by the captain and senior officers, who would then provide details to the crew. Members of RIB teams could be prompted to provide details of the operations through conversation.³⁴² At several points during the

³⁴² See for example Field Journal, post action crew debriefing, December 31, 2010.

campaign, raw film footage and photographs of RIB actions were shown to the crew, which also provided insight into actions.³⁴³

- Extensive notes detailing information from conversations with crew members. There was considerable down time and I held conversations with crew members on a range of issues. The most extensive conversations were held with my ‘chore buddy,’ fellow deck crew members, my roommates, and several members of the galley.³⁴⁴ These conversations yielded information on personal motivations and philosophies, opinions on strategy and tactics, details of actions and previous campaigns, and reactions to events and actions as they occurred throughout the operation. In addition to informal conversations which arose through the course of everyday activity, I also prepared a list of areas of inquiry which I would pursue over the course of several days. For example, asking for definitions of violence and for clarifications of operational goals.
- Information from semi-formal and informal interviews. Towards the end of the campaign, I conducted semi-formal and informal interviews with several key officers, which included Captain Alex Cornelissen, Hammarstedt, second mate Vincent Burke, boson Benjamin (Posty) Potts, and ship’s artist and member of the bridge crew, Geert Vons. Asking more pointed questions about SSCS strategy, events which had occurred during the campaign, and previous campaigns. The interview with Potts was invaluable in outlining the motivations and details of the Potts-Lane incident. Vons, the director of SSCS Netherlands, was invaluable in detailing ship registration and flagging procedures in the Netherlands.
- Notes from conversations with the film crew. These conversations represented an excellent opportunity to obtain information on actions (in which film crew members participated). I also investigated the relationship between the SSCS and Animal Planet/Discovery Media in order to better understand the SSCS’s media strategy (and see Appendix 3).
- Detailed descriptions of conversations around tactical innovation and diagrams and plans of used and imagined tactics. The deck crew and other crew members were constantly discussing tactical innovations. These conversations were useful in that they highlighted

³⁴³ *Ibid*, February 4, 2011.

³⁴⁴ See for example *ibid*, conversations while peeling garlic, December 16, 2010.

tactical aims, the role of tactics in accomplishing overall strategic objectives, and (strategic and ethical) restrictions on tactics.³⁴⁵

In addition to this information, the 'Field Journal' also contained innocuous details on meals, wildlife encounters, personal introspection and so on. The need to process this data and to not get embroiled in details was central to the analysis.

3.4.2 - Data Analysis

While some information was analyzed during the course of the fieldwork, the majority of analysis began at the conclusion of the operation. The overall understanding of the operation and functioning of the SSCS was combined with a full narrative of what occurred on the operation. This provided a comprehensive account of a single SSCS operation. Field notes were reviewed with the aim of isolating important observations, key events, decision making processes and causality. I was particularly interested in identifying key components of SSCS strategy, and the various impacts these components had upon other actors. Identified components were then triangulated and supplemented with information which had not been available during field work. This was particularly useful in identifying the impacts of SSCS actions. While the field observations produced highly valid data, this data was somewhat unreliable. Examples of some components of SSCS strategy which did not occur during 'Operation No Compromise' but which had played a central role in previous operations included rammings/collisions and boardings. As a result, an analysis of the existing primary and secondary literature on the SSCS was conducted alongside that of the field observations, again seeking to identify components of SSCS strategy which may not have been present during 'Operation No Compromise.' A dynamic feedback process drove the analysis, with components extracted from the literature informing investigation into the field observations, and salient field observations driving further investigation into the literature. This was done to provide the most comprehensive understanding of the various components of SSCS strategy as possible, and in order to avoid drawing conclusions from potential idiosyncrasies of a single operation.

³⁴⁵ Field Journal, my notebooks were often used to draft different prop-fouler designs, see for example December 28, 2010.

Once identified, the narrative and details of the operation were examined in order to uncover the strategic choices which caused an event/component, and the behaviours of actors as a result of the event/component. This permitted me to understand various components of SSCS strategy, the strategic choices which compelled their use, their application throughout the entire Antarctic anti-whaling campaign and impact on other actors. The success of these actions was evaluated on their capability of achieving stated campaign objectives, as determined by using counterfactuals. The aim was to reveal the mechanisms which are triggered by SSCS actions, and to ascertain what makes them effective, and ultimately, reveal SSCS strategy.

In order to better understand the SSCS anti-whaling campaign I also undertook a detailed examination of the broader whaling issue (which follows in Chapter 4). This allowed me to situate the SSCS campaign within the anti-whaling movement, and to understand and to contrast the SSCS strategy with conventional INGO/TAG strategies which have been employed over the course of this lengthy campaign. My understanding of international whaling politics was also bolstered through my observations of the meeting of the IWC (see 3.3.3 – IWC Jersey, above). I scrutinized Japanese whaling, its origins, its legality, and factors contributing to its continued practice, aspects of which could effect the impact INGO/TAG strategies on Japanese whaling. I also explored the legal context of the Southern Ocean, the theatre in which the SSCS campaigns occur. A firm understanding of the numerous laws and treaties surrounding whaling allowed me to comprehend the impact these laws and treaties may have on SSCS operations and strategies, and to unearth any strategic opportunities that they might present.

CHAPTER 4 – HISTORY OF WHALING AND THE ANTI-WHALING CAMPAIGN

4.1 - Of Regulations and Whales

This chapter provides background to the whaling issue. It begins with a short history of whaling, the IWC and early attempts by this IO to protect whales. It then examines the transnational campaign to end whaling and the strategies and tactics which led to a global moratorium on commercial whaling. The impact of the moratorium is explored, as are some of the *ad hoc* enforcement mechanisms which have emerged alongside it. Post-moratorium whaling diplomacy in the IWC is characterized by a standoff between pro- and anti-whaling groups. Understanding the inability of INGOs/TAGs employing conventional strategies to make progress towards ending whaling practices serves to demonstrate the significance of apparently unconventional strategies such as those employed by the SSCS. The chapter also provides an in-depth examination of Japanese whaling, starting with the history and structure of the Japanese whaling industry, followed by observations as to how it has been affected by the moratorium, and discussions of why Japan continues whaling and of the legality of these practices. The chapter concludes with an outline of the legal context in which Japanese whaling, and consequently SSCS operations occur, with an examination of the multitude of international and domestic laws in the Southern Ocean.

4.1.1 - The Creation and Troubles of the IWC

Humans have hunted whales throughout history, treating them as *res nullius* – free property that anyone could hunt.³⁴⁶ In the late 19th and early 20th century the introduction of new technology – the factory ship, the explosive harpoon, and the inflation lance – caused the exploitation of whale populations to reach industrial levels.³⁴⁷ These improved hunting methods led to the rapid decline of whale populations worldwide. As easily accessible whale stocks declined, whalers ventured further afield. Declining populations demanded regulation, and a first

³⁴⁶ Freeland and Drysdale 2005:1, see also Berger-Eforo 1996:440.

³⁴⁷ Bailey 2008:293; van Drimmelen 1991:240.

attempt was made in 1931, with the Convention for the Regulation of Whaling. This treaty called for the barest minimum of actions, such as prohibitions on the taking of right whales, calves, immature and lactating whales.³⁴⁸ The failure of this treaty has been blamed on a lack of scientific knowledge, the refusal of key whaling states to sign on, and upon a lack of enforcement mechanisms.³⁴⁹

In 1946 the major whaling nations signed the International Convention for the Regulation of Whaling (ICRW). The ICRW established the IWC which was tasked with securing the “proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”³⁵⁰ The IWC was created essentially as an exclusive club among whaling nations in order to protect the industry.³⁵¹ In its early years, the IWC was ineffective in reducing whale harvests. Although the IWC’s Scientific Committee made repeated recommendations for the restriction of whale harvests between 1949 and 1979,³⁵² its recommendations were largely ignored, often because insufficient scientific data precluded accurate population estimates, and the precautionary principle was balanced in favor of the whaling industry.³⁵³ During this period, already unsustainable quotas were habitually exceeded by member states, catch reports were falsified, and ‘pirate whaling’ – i.e. harvesting by ships registered to countries that were not IWC members – was widespread.³⁵⁴

One of the primary reasons the IWC failed to sustainably manage whale populations, was the fact that the IWC was in essence a whalers club – foxes in charge of sustainably managing the henhouse.³⁵⁵ Commercial interests persistently won out over sound conservation science. The failure of the IWC can also be attributed to defects in the ICRW itself. The IWC ultimately lacks an enforcement mechanism, and is only capable of making “recommendations calling upon contracting parties to conform to IWC regulations.”³⁵⁶ Member states can however unilaterally enforce IWC regulations “within the boundaries of international law.”³⁵⁷ Even if the IWC did have the power to sanction violators, it would still be faced with a second major challenge,

³⁴⁸ League of Nations Treaty Series, CLV 349; see Klein 2008-2009.

³⁴⁹ See *ibid*, p. 155.

³⁵⁰ ICRW, Preamble.

³⁵¹ Bailey 2008:295; and see Mandel 1980:104-105.

³⁵² Birnie 1985:193.

³⁵³ See Darby 2007:27-28; van Drimmelen 1991.

³⁵⁴ Darby 2007:59; van Drimmelen 1991:256; Mandel 1980:108; Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

³⁵⁵ See for example Clapham et al. 2007:317.

³⁵⁶ Mandel 1980:108; and see Carlarne 2005-2006:46; Suhre 1999-2000:316; Watanabe 1980:73.

³⁵⁷ That is within national waters and with respect to their flagged vessels. Hutchinson 2006:14.

notably the ‘objection’ or ‘opt-out’ provision. Under the ICRW, any member is entitled to object to an amendment to the *Schedule*, and by so doing, to become exempt from any requirements of that amendment, until such time as that member withdraws their objections.³⁵⁸ The ICRW also lacks adequate dispute settlement provisions.³⁵⁹ These issues continue to plague the IWC today.

4.1.2 - Early Anti-Whaling Efforts

The failure of the IWC to effectively regulate whaling became increasingly apparent as whale stocks plummeted. Whale populations around the world teetered on the brink of extinction, even those inhabiting such remote locations as Antarctica.³⁶⁰ The sixties and seventies saw the emergence of the environmental movement, and activists quickly began a transnational ‘Save the Whale’ campaign.³⁶¹ The widespread awareness campaign that mobilized public opinion against whaling used animal rights and conservation arguments, arguing that whaling was both unethical and threatened the long term survival of whale species. People were introduced to the haunting sounds of humpback whale songs through a recording included in the January 1979 *National Geographic Magazine*.³⁶² A group called Project Jonah produced the book *Mind in the Waters*, which argued that cetaceans, like humans, are intelligent and self-aware.³⁶³

Kalland suggests that these early awareness raising efforts led to the creation of a ‘super whale,’ a totemized symbolic whale constructed by “lumping together traits found in a number of species.”³⁶⁴ This had the effect of masking the “great variety that exists in size, behaviour and abundance among the 75 or so species of cetaceans.”³⁶⁵ This ‘super whale’ was ascribed symbolic significance, it became anthropomorphized, and as a result whales were portrayed as “rights-bearing persons, sacred human-like creatures, whose killing is immoral and

³⁵⁸ ICRW, Article V(3), for discussion see *inter alia* Freeland and Drysdale 2005:8; Suhre 1999-2000:316-317; van Drimmelen 1991:256 and 242; Watanabe 1980:73.

³⁵⁹ Jabour and Iliff 2009:282; Carlarne 2005-2006:10 and 46.

³⁶⁰ Bailey 2008:295.

³⁶¹ Kalland 1993a, citing Holt 1985:192; Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

³⁶² Roger Payne, “Songs of the Humpback Whale – with Commentary by Roger Payne,” *National Geographic* (January, 1979), LP, p.24A.

³⁶³ McIntyre 1974; and see *inter alia* Sakaguchi 2013:2; Day 1987:152.

³⁶⁴ Kalland 1993b:4.

³⁶⁵ Epstein 2003:316.

uncivilized.”³⁶⁶ Groups such as the Friends of the Earth (FoE) and the nascent Greenpeace, through various means, effectively re-framed the whaling issue from one of resource management to an environmental and ethical issue.³⁶⁷

The campaign achieved its first breakthrough at the 1972 United Nations Conference on the Human Environment in Stockholm, which passed a resolution (52-0) recommending a ten-year moratorium on commercial whaling.³⁶⁸ A similar motion was defeated by the IWC later the same year. Meanwhile, individual states were beginning to take action outside the IWC. The US had already enacted the ‘Pelly Amendment’ to the US Fishermen’s Protection Act in 1971, which enabled the U.S. government to place trade embargoes on states that violated U.S. Fisheries laws.³⁶⁹ This was further bolstered in 1973 when the US passed the Endangered Species Act and the Marine Mammal Protection Act, essentially closing U.S. markets to whale products.³⁷⁰ In 1979 the Packwood-Magnuson Amendment reinforced existing legislation with respect to whaling by allowing for a reduction of a foreign country’s fishing allocations in US waters if that country’s actions were deemed to undermine the effectiveness of the IWC.³⁷¹ In 1975 the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) took force, severely restricting the international trade in whale products, with most great whales listed in Appendix I and the remaining of the order of *Cetacea* in Appendix II.³⁷² Various countries adopted laws protecting whales and the trade in whale products, including Australia, which passed the Whale Protection Act in 1980.³⁷³

During this time the transnational campaign to end whaling was very active. Groups such as FoE, WWF, and Greenpeace engaged in classic awareness and persuasion campaigns. They initiated letter-writing campaigns, mobilized school children and conducted street theatre outside

³⁶⁶ Blok 2008:39; and see Andonova and Mitchell 2010; Blok 2008:43; Darby 2007:211; van Ginkel 2005:89; Wapner 2000:103-4; Kalland 1993b:7; D’Amato and Chopra 1991.

³⁶⁷ Bailey 2008:296.

³⁶⁸ Report on the UN Conference on the Human Environment, UN Doc. A/CONF. 48/Rev. 1, Recommendation No. 33 (1972).

³⁶⁹ 22 U.S.C.A §§ 1971-1980 (1954, 1999); and see Suhre 1999-2000:318; Berger-Eforo 1996:470; MacLeod 1994:96 and 92-93; van Drimmelen 1991:252.

³⁷⁰ ESA: 7 U.S.C. §§ 136, 16 U.S.C. § 1531 et seq., and MMPA: 16 U.S.C. § 1361 et seq. 1401-1407, 1538, 4107; and see Berger-Eforo 1996:470.

³⁷¹ 16 U.S.C.A §§ 1801-1803 (1976); and see Sakaguchi 2013:3; Freeland and Drysdale 2005:11; Berger-Eforo 1996:470; MacLeod 1994:96; van Drimmelen 1991:252.

³⁷² Emphasis Sand 2008:61; and see Hutchinson 2006:16; Carlarne 2005-2006:24.

³⁷³ Epstein and Barclay 2013:109; and Klein 2008-2009:158; and generally see Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

IWC meetings. Greenpeace brought the issue of whaling to the attention of the world through its novel and daring actions. In 1975, the Greenpeace vessel the *Phyllis Cormack* engaged the Soviet whaling fleet in the Pacific Ocean. Greenpeace launched zodiacs, and placed them between the whalers and their prey.³⁷⁴ Mandel describes Greenpeace's actions as 'direct action', noting that Greenpeace was able to directly save around 100 whales.³⁷⁵ However this did not appear to be the primary goal of Greenpeace action, as Mandel elaborates, "preventing the slaughter of whales is not only an end in itself but also, through the dramatic form in which it takes place, a means of raising the environmental consciousness of both the resource consumers and the world at large."³⁷⁶ In addition, 'David and Goliath' imagery produced by Greenpeace actions resulted in some of the most iconic images of the environmental movement.³⁷⁷ The SSCS became involved in the emerging 'whale war' in the late seventies, which is discussed in the following chapter (Chapter 5.1.2).

4.1.3 - The Moratorium

Activists were also heavily involved in and around the IWC employing insider strategies. NGO attendance at meetings of the IWC grew substantially. Bailey notes that "five attended in 1972 and eight attended in 1973, 57 observers of all kinds (including pro-whaling groups) attended in 1982, reaching a peak in 1996 with 114."³⁷⁸ The International Union for Conservation of Nature (IUCN), WWF, Greenpeace, and other INGOs/TAGs lobbied the IWC Scientific Committee and national delegations, supplied scientific data and recorded violations of the ICRW.³⁷⁹ Greenpeace activists recruited anti-whaling states to join the IWC, going so far as to help states prepare applications, and even paying membership dues and travels expenses for delegates.³⁸⁰ These efforts were necessary in so far as while resolutions within the IWC require a simple majority, amendments to the Schedule, which regulates seasons and quotas, requires a

³⁷⁴ Sakaguchi 2013:2; and see *inter alia* Zelko 2013; Weyler 2004; Watson 1994; Brown and May 1989; Eyerman and Jamison 1989; Day 1987:12; Watson 1982; Hunter 1979.

³⁷⁵ Mandel 1980:111, citing Tidbury 1978.

³⁷⁶ *Ibid.*

³⁷⁷ Sakaguchi 2013:2; Bailey 2008:312; Darby 2007.

³⁷⁸ Bailey 2008:309.

³⁷⁹ Weyler 2004; Keck and Sikkink 1998:12; Hunter 1979:212; Hunter and Weyler 1978.

³⁸⁰ See *inter alia* Sakaguchi 2013:3; Bailey 2008:311; Keck and Sikkink 1998:127; Day 1987:97.

three-quarters majority.³⁸¹ Recruitment and lobby efforts were successful and helped shift the balance within the IWC into the anti-whaling camp. In 1982, after several failed attempts, the IWC voted to amend Section 10(e) of the Schedule, instituting a 10-year moratorium on commercial whaling to take effect in 1986.³⁸²

The moratorium enacted an absolute ban on *commercial* whaling; however, like the ICRW itself, the moratorium is riddled with exceptions. Whaling is still permitted for ‘aboriginal subsistence’ purposes,³⁸³ and whaling is permitted under special research permits. Article VIII of the ICRW provides that,

any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research ... and the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.³⁸⁴

As with all decisions of the IWC, members are permitted to opt-out by formally entering reservations to a decision. Immediately after the IWC adopted the moratorium, Japan, Norway, Peru and the USSR filed formal objections, thereby declining to be bound by the moratorium.³⁸⁵

As a result of continued whaling following the moratorium, “the zero quotas for 1986 made no difference to the number of whales that would be killed.”³⁸⁶ The battle to stop whaling was far from over. Efforts to compel member states to remove their objections to the moratorium were initially led by the US, who, through the Pelly and Packwood-Magnuson Amendments, threatened trade sanctions against any country that objected to or violated the moratorium.³⁸⁷ Threats of embargoes on fish product imports and reductions in fishery allocations were sufficient to compel Spain, Korea, Taiwan and Chile to all bring their whaling practices in line with the IWC.³⁸⁸ Iceland, who did not object to the moratorium but initiated a ‘scientific’ whaling program in 1987, reduced its quotas after strong pressure from the US and a high profile

³⁸¹ ICRW 1946 V(1-4); van Drimmelen 1991:242.

³⁸² Klein 2008-2009:158, citing ICRW Schedule 10(e); see also Berger-Eforo 1996:461; Day 1987; and see generally Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

³⁸³ Currently, the IWC allows aboriginal subsistence whaling for Denmark, the Russian Federation, St. Vincent and the Grenadines, and the United States. See ICW, “Aboriginal Subsistence Whaling,” available at <http://iwc.int/aboriginal> (accessed June 28, 2013); Carlarne 2005-2006:9; Berger-Eforo 1996:461.

³⁸⁴ ICRW, Article VII, Paragraph 1.

³⁸⁵ See for example Carlarne 2005-2006:9.

³⁸⁶ Day 1987:127.

³⁸⁷ Andresen and Skodvin 2008:129, 137.

³⁸⁸ MacLeod 1994:97.

Greenpeace boycott of its seafood.³⁸⁹ Iceland later quit the IWC in 1992, only to rejoin later, with a partial objection to the moratorium.³⁹⁰ Norway initially suspended whaling operations, but resumed in 1993.³⁹¹ At one stage in 1992 Norway, Iceland, Greenland and the Faroe Islands sought to establish the North Atlantic Marine Mammal Commission (NAMMCO). This was done to allow these states to whale outside of the IWC while still complying with Article 65 of the United Nations Convention on the Law of the Seas (UNCLOS), which requires that states work through an appropriate international organization with regards to regulating whaling.³⁹² In 1986, Japan withdrew its objection to the moratorium under heavy U.S. pressure, but subsequently announced that it would launch a ‘scientific’ whaling program.³⁹³

Scholars generally describe two *ad hoc* enforcement measures which have developed outside but alongside the IWC. The first involved the US, and its use of economic sanction. The second has been described as the actions of “militant non-governmental organizations.”³⁹⁴ NGOs such as Greenpeace and the Humane Society International (HSI) attend IWC meetings and serve a monitoring function, however it is the DA of the SSCS that is in fact cited as one of the enforcement mechanisms of the IWC. It is interesting that the SSCS’s actions should be cited as one of the two major (*ad hoc*) enforcement mechanisms of the IWC, when the IWC has passed resolutions condemning SSCS actions.³⁹⁵ The role of the US as the ‘policeman’ of the IWC has also been significantly reduced in recent years, despite considerable domestic and transnational pressure placed on the US to take action against continued whaling operations.³⁹⁶ The US’s softened position can be explained by its desire to receive approval for aboriginal subsistence quotas. In 1997 the US and Russia negotiated subsistence quotas for various ‘aboriginal’ groups within their borders, however at their 2002 Annual Meeting the IWC defeated a US attempt to

³⁸⁹ Sakaguchi 2013:8; and see Economics for the Environment Consultancy, “Economics of Subsidies to Whaling: Report submitted to WWF-UK and WDCCS,” June 10, 2009, available at www.assets.panda.org/downloads/econ_whaling_eftec_final.pdf (accessed May 17, 2012);.

³⁹⁰ Darby 2007:179-180.

³⁹¹ Bailey 2008:300; Carlarne 2005-2006:9.

³⁹² UNCLOS, December 10, 1982, 1833 U.N.T.S. 397, Article 65; and see Carlarne 2005-2006:31, 10; Freeland and Drysdale 2005:4.

³⁹³ See Berger-Eforo 1996:471; and discussion in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

³⁹⁴ van Drimmelen 1991:250-251.

³⁹⁵ IWC resolutions 2011-2, also 2007-2 and 2006-2; and safety at sea discussion at 2011 IWC meeting, Field Journal, July 11-14, 2011. For discussion see *inter alia* *Ibid*, p. 241; Jefferies 2009; Freeland and Drysdale 2005:14-15; MacLeod 1994:102-103.

³⁹⁶ Sand 2008:68.

renew its quota. The US has been cast into a conflicted position as both a strong anti-whaling nation but also one which requires approval for subsistence quotas.³⁹⁷

4.2.4 - The Current Standoff in the IWC

Almost immediately following the implementation of the moratorium, measures were being taken within the IWC to prepare for the end of the 10-year moratorium. The Revised Management Procedure (RMP) sought to determine sustainable quotas for species, such as the minke, which was considered to have recovered sufficiently to permit the resumption of limited whaling, but efforts to resume some commercial whaling were unsuccessful.³⁹⁸ The scientific committee made “recommendations for limited commercial whaling of specific species at two consecutive IWC meetings. The IWC membership rejected the recommendations on both occasions, resulting in the resignation of the chairman of the scientific committee.”³⁹⁹ The global norm against whaling is powerful, so much so that the issue had gone beyond that of the sustainable management of a resource.⁴⁰⁰ Mitchell argues that this represented the beginning of an era of ‘moral management,’ where the idea that whales have inherent worth is given precedence over science.⁴⁰¹

The IWC is currently in an ‘adversarial deadlock’ polarized between the pro- and anti-whaling camps, and is generally viewed as dysfunctional, choked by acrimony, and replete with ‘unsatisfactory discourse.’⁴⁰² The IWC is incapable of making any substantive decisions because each side demands such “extreme degrees of certainty in any decisions on the taking of whales.”⁴⁰³ Some have argued that the decisions the IWC have managed to reach, such as the creation of various ‘whale sanctuaries,’ are in fact very dangerous, as such actions do “little more than provide a false sense of security by assuming that protection for whale populations are in

³⁹⁷ Freeland and Drysdale 2005:27; and observations at IWC, Field Journal, July 11-14, 2011.

³⁹⁸ Suhre 1999-2000:311-312, 320; Berger-Eforo 1996:475.

³⁹⁹ Berger-Eforo 1996:475; and see for example IWC resolution 1994.5, ‘Resolution on the Revised Management Scheme.’

⁴⁰⁰ Blok 2008:40, 54; Clapham, et al. 2007:318; Strausz 2007; Hirata 2005:141; Day 1987:112.

⁴⁰¹ Strausz 2007, quoting Mitchell 1998:144.

⁴⁰² See *inter alia* Sakaguchi 2013:10; Jabour and Iliff 2009:282; Klein 2008-2009:161, 177, citing Rose and Crane 1993:165; Carlarne 2005-2006:10; Berger-Eforo 1996:441.

⁴⁰³ *Ibid*, p.177; see also Blok 2008:44; Heazle 2004:372; and discussion in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

place.”⁴⁰⁴ In recent years, in order to reduce the characteristic acrimony within meetings, as well as to address the fact that any dissenting party can simply opt-out of a decision, the IWC has sought to employ consensus decision making. Members go to considerable lengths to avoid bringing an issue to a potentially divisive vote.⁴⁰⁵ Anton characterizes the current standoff within the IWC as “a Pareto-optimal situation – even if the situation is messy and unstable.”⁴⁰⁶ Ishii and Okubo agree, and note that “the primary objective of Japanese whaling diplomacy...is the continuation of so-called ‘scientific’ whaling... and *not* the resumption of commercial whaling.”⁴⁰⁷ They argue that Japan (and others), do not in fact want to lift the moratorium, but rather that this position is adopted in order to maintain the current deadlocked status-quo, which in turn allows their ‘scientific’ whaling program to continue.⁴⁰⁸ This view is of course controversial and contested, and a variety of explanations have been posited seeking to explain Japan’s current position on whaling.

The IWC remains deadlocked and the transnational campaign against whaling appears to have reached the limit of its ability to use conventional INGO/TAG strategies to end whaling. The movement was successful in disseminating the anti-whaling norm around the world.⁴⁰⁹ There are several holdouts, and it has been argued that the anti-whaling movement may have strengthened these states’ commitment to whaling.⁴¹⁰ For example, public backlash against the anti-whaling movement in Iceland and Norway has led to the creation of several pro-whaling organizations (e.g. the High North Alliance and the Group to Preserve Whale Dietary Culture).⁴¹¹ Similarly, external pressure appears to have increased Faroese support of its pilot whale hunt.⁴¹² This has also been the case in Japan, where traditional transnational campaigning has had very limited success.

⁴⁰⁴ Darby 2007:173.

⁴⁰⁵ See Field Journal, July 11-14, 2011; and see Darby 2007:245; Heazle 2004:371.

⁴⁰⁶ Anton 2009:319-320.

⁴⁰⁷ Ishii and Okubo 2007:56.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Strausz 2007.

⁴¹⁰ Sakaguchi 2013; Kalland 1993b:3.

⁴¹¹ Andresen and Skodvin 2008: 121, 142-3; Bailey 2008:302-303.

⁴¹² van Ginkel 2005:87-88.

4.2 - Japan and Whaling

4.2.1 - History and Structure

The Japanese government has long argued that Japan has a distinct whale-eating culture – *gyoshoku-bunka* – that the practice of eating whale is widespread, and dates back thousands of years.⁴¹³ However this is true only for a small number of isolated coastal communities and ‘exceptional individual cases.’⁴¹⁴ Commercial whaling – particularly Antarctic whaling – and the widespread consumption of whale, is in fact a legacy of the Second World War. The consumption of whale meat became commonplace after General McArthur supported the resumption of Antarctic whaling as a means of addressing the humanitarian situation arising from the war, the result of a critical shortage of protein, fats and oil.⁴¹⁵ Morikawa argues that “it is both unfair and misleading to assert that these exceptional individual cases and the later transitory post-war phenomenon form an overall historical precedent and a basis for justifying and promoting Japan's modern-day commercial whaling.”⁴¹⁶ Whaling persisted long after the post-war protein crisis, though the popularity of whale meat gradually flagged, and costs escalated. As a result, the major whaling companies soon ran into financial difficulties, and in 1975 they “held urgent summit talks and... agreed to create a new integrated flagship company [Nippon Kyodo] to strive to preserve the whaling industry.”⁴¹⁷

4.2.2 - Japanese Whaling After the Moratorium

The moratorium had little effect on Japanese whaling practices, and Japan has continued to whale by promoting the whaling of ‘small type whales’ (which fall outside the control of the IWC), and by initiating its ‘research’ whaling program. In 1987 the Japanese legislatures “*unanimously* adopted a resolution requesting that the government devote itself to conducting

⁴¹³ Hirata 2004:187, 141.

⁴¹⁴ Morikawa 2009:14.

⁴¹⁵ See Klein 2008-2009:156-157; Hirata 2005:141.

⁴¹⁶ Morikawa 2009:14.

⁴¹⁷ *Ibid*, p.25, 26; Darby 2007:145.

scientific whaling as much as possible.”⁴¹⁸ Two ‘research’ whaling programs were established: JARPN in the north-western Pacific, and JARPA in the Southern Ocean.⁴¹⁹ The whaling industry was also reorganized: Nippon Kyodo was folded and was transformed into Kyodo Senpaku Kaisha Ltd. (Kyodo), represented by the Japan Whaling Association (JWA). The Institute of Cetacean Research (ICR) was created in 1987. The ICR (a *zaidan hojin* or quango) is entrusted by the Fisheries Agency (FA) (under the supervision of the Ministry of Agriculture, Forestry and Fisheries (MAFF)), with conducting its ‘scientific’ whale research. The ICR charters Kyodo’s fleet to conduct its ‘research whaling.’⁴²⁰

MAFF and the FA maintain that the moratorium was only a temporary measure and have been operating and setting policy under this assumption. Japan explicitly launched its ‘research’ whaling program as a means to gather sufficient evidence to support a resumption of commercial whaling.⁴²¹ JARPA I was carried out from 1987 to 2005, with the goal of

elucidating the role of whales in the Antarctic marine ecosystem, the effect of environmental changes on cetaceans, and the stock structure of the Southern Hemisphere minke whales to improve stock management, as well as estimating the biological parameters to improve the stock management of the Southern Hemisphere minke whale.⁴²²

Following an initial trial year, quotas given to JARPA by the Japanese government were gradually increased (see Table 1, Chapter 5).⁴²³ Overall more than 6800 minke were killed through JARPA I.⁴²⁴ Baker et al. note that JARPA I killed 2.4 times more whales than all the research whaling conducted from 1949 to 1987 by all states combined.⁴²⁵ Furthermore, the number of whales killed during the first JARPA I cruise in 1987 “exceeded the number of whales taken in commercial whaling activities in the previous season.”⁴²⁶ The whales killed by Japanese

⁴¹⁸ Emphasis original. Sakaguchi 2013:7.

⁴¹⁹ Morikawa 2009:5.

⁴²⁰ See *inter alia* Morikawa 2009:5, 66; Blok 2008:51-52; Chelliah and D’Netto 2008:68; Darby 2007:145-146, 148; Hirata 2005:140.

⁴²¹ Kanehara 2009:555; and see Hirata 2004:145, 190.

⁴²² Klein 2008-2009:176.

⁴²³ See Table 1; and also all JARPA Cruise Reports 1989 to 2011.

⁴²⁴ Klein 2008-2009:176; and see all JARPA Cruise Reports 1987 to 2011.

⁴²⁵ Baker et al. 2000:1696.

⁴²⁶ Freeland and Drysdale 2005:10; see also Day 1987:123-124.

‘research’ represent 91% of all catches under IWC special research permits since such permits were first used in 1985.⁴²⁷

In 2005 Japan announced JARPA II; raised the quota of minke, and included the harvesting of 10 endangered fin whales. JARPA II had similar objectives to its predecessor, and sought to gather the data required to make the case for “developing future management objectives”, in other words, the resumption of commercial whaling.⁴²⁸ After a two year feasibility study, Japan raised the number of fin whales to 50 in 2007 and added 50 humpback whales to the quota.⁴²⁹ The 50 endangered humpbacks were later removed, which Malcolm Turnbull, the Australian Environment Minister at the time called “holding humpbacks hostage.”⁴³⁰

In actions similar to those of activists, Japan has sought to bolster its position within the IWC by recruiting ‘pro-whaling’ members. The number of bonafide ‘pro-whaling’ countries in the world is very small. In order to recruit supporters Japan has used “the promise of aid to small, impoverished nations ‘in order to gain appreciation of Japan’s position’ on the whaling issues,” a position which has been categorized as buying votes with fisheries grants.⁴³¹ Japan’s whaling diplomacy has been painted as a ‘worrisomely fragmented diplomatic approach’ whereby the MAFF – and specifically the FA – engage in diplomacy which often conflicts with efforts of the Ministry of Foreign Affairs.⁴³² Within the IWC, Japan appears to intentionally foster acrimony and has a very aggressive and disruptive negotiation strategy.⁴³³ Japan brings, by far, the largest delegation to IWC meetings, bolstered by professional and expensive lobbyists, such as Butterfield Carter and Associates, along with a host of ‘NGOs,’ including the JWA and numerous ‘Astroturf groups’ such as the Shimonoseki Group to Preserve Whale Dietary Culture, the All Japan Seamen’s Union, and the Japan Small-Type Whaling Association.⁴³⁴ Morikawa

⁴²⁷ Hutchinson 2006: 5, fn 32; and see IWC, “Special Permits Catches since 1985,” available at http://iwc.int/table_permit.htm (accessed July 2, 2013).

⁴²⁸ Klein 2008-2009:177.

⁴²⁹ *Ibid*, p.176; McGrath 2006:2; and see ICR, SC/58/O7:2.

⁴³⁰ Darby 2007:245, quoting Turnbull; and see Roeschke 2009:104.

⁴³¹ Chelliah and D’Netto 2008:73.

⁴³² Morikawa 2009:54, 124.

⁴³³ See Field Journal, July 11-14, 2011; see also Ishii and Okubo 2007:79.

⁴³⁴ *ibid*, Field Journal; Darby 2007:242; IWC, “Delegates and Observers Attending the 64th Annual Meeting,” IWC/64/3 available at http://archive.iwcoffice.org/_documents/commission/IWC64docs/64-3.pdf (accessed July 3, 2013).

characterizes Japan's position, based on its current whaling practices, as seeking "the maintenance and re-expansion of whaling" rather than a resumption of commercial whaling.⁴³⁵

4.2.3 - *Why Japan Whales*

As has been noted, whale meat is not particularly popular in Japan. Surveys suggest that less than 4% of Japanese regularly eat whale meat,⁴³⁶ that whale comprises only 0.28% of all Japanese seafood consumption,⁴³⁷ and that 83% of Japanese have never eaten whale.⁴³⁸ In Japan whales are considered fish, and people are generally indifferent to the whaling issue.⁴³⁹ Demand for whale meat is so low that MAFF statistics reported whale meat stocks in 2005 at 3,511 tonnes, and growing.⁴⁴⁰ It has been reported that unsold whale meat has been provided free to schools in order to build a market for whale meat.⁴⁴¹ This does little to support Japanese government claims as a 'traditional whale-eating culture.' However claims that whale-eating is somehow an integral part of Japanese culture have allowed the government to brand any attack against whaling as 'cultural imperialism.'⁴⁴² As a result of perceptions of cultural imperialism, it has been argued that anti-whaling activism (of all types) appears to have led to backlash within Japan, boosting support for Japan's whaling program by linking it to nationalism.⁴⁴³ This creates a complex situation; whereby the vast majority of Japanese do not eat whale meat, and as one survey noted, would not support additional government funding towards the whaling program, but where more Japanese support the general existence of the whaling program (27%) than are

⁴³⁵ Morikawa 2009:35.

⁴³⁶ Steve Shallhorn, CEO of Greenpeace Australia Pacific quoted by Miller 2006:233; Darby 2007:166, quoting a 1999 MORI poll; see also similar results in surveys quoted in Japan Daily Press, "The Japanese Public's Opinion on Whaling: Two Different Results From Single Survey," November 27, 2012, available at <http://japandailynews.com/the-japanese-publics-opinion-on-whaling-two-different-results-from-single-survey-2718986/> (accessed September 7, 2013).

⁴³⁷ Darby 2007:144.

⁴³⁸ *Ibid.*, p.166 quoting a 2006 Gallup poll.

⁴³⁹ Morikawa 2009:121; Hirata 2005:141; Liat Clark, "Most Japanese are Either Apathetic Towards Whaling, or Want It," *Wired.co.uk*, November 27, 2012, available at <http://www.wired.co.uk/news/archive/2012-11/27/japanese-public-want-whaling> (accessed July 2, 2013).

⁴⁴⁰ Morikawa 2009:41 quoting a MAFF report; Darby 2007:253.

⁴⁴¹ Morikawa 2009:36; Klein 2008-2009:166.

⁴⁴² Morikawa 2009:13; Klein 2008-2009:181; Scheiber, Mengerink and Song 2008:157; Darby 2007:210-211; Hirata 2005:142.

⁴⁴³ See for example Sakaguchi 2013:1; Blok 2008; Hirata 2004:180; Day 1987:116-117.

opposed to it (18.5%) (though the majority of people have no opinion on whaling whatsoever), and where the government is staunchly pro-whaling.⁴⁴⁴

Given these numbers it is not surprising that there is dearth of domestic anti-whaling pressure in Japan. The Whale Conservation Coalition of Japan, “established in 2001 to mobilize public opinion against whaling in advance of the IWC annual meeting in 2002,” is comprised of the Dolphin and Whale Action Network, the International Fund for Animal Welfare (IFAW), Greenpeace Japan, and the Japan Whale Conservation Network.⁴⁴⁵ Thus far this Coalition has conducted small rallies, issued protest letters and promoted public education. It has met with limited success, in so far as Japan’s “bureaucracy-centered decision-making system has allowed virtually no room for citizens’ groups to effect Japan’s whaling policy.”⁴⁴⁶

There also appears to be a “strong pro-whaling consensus among Japan’s power elites,” and powerful bureaucratic interests at stake.⁴⁴⁷ The FA is “authorized to formulate policy on all whaling matters.”⁴⁴⁸ Bureaucratic organizations are loath to relinquish vested interests, power, and resources. Given the amount of resources and political power granted to the MAFF and FA as a result of Japan’s continued whaling operations, it is unlikely that these entities would welcome an end to Japanese whaling.⁴⁴⁹ Whaling is also seen in the light of broader fisheries’ issues. Fish are a very important part of Japanese diet, and with fish stocks are rapidly depleting globally, issues involving fisheries fall into the area of food security.⁴⁵⁰ Japan is concerned that “a major loss of concession on this issue [the whaling issue] could potentially have severe ramifications for Japan’s extensive and critically important fisheries agreements elsewhere.”⁴⁵¹ Japan continues to whale in spite of a powerful global norm against whaling and large scale and protracted transnational advocacy. It is clear that traditional advocacy strategies have had little impact on Japanese whaling.

⁴⁴⁴ Associated Press survey quoted in the Japan Daily Press, “The Japanese Public’s Opinion on Whaling: Two Different Results From Single Survey,” November 27, 2012, available at <http://japandailynews.com/the-japanese-publics-opinion-on-whaling-two-different-results-from-single-survey-2718986/> (accessed September 7, 2013); and see discussion in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁴⁴⁵ Morikawa 2009:120; Blok 2008:40; Hirata 2004:193.

⁴⁴⁶ Hirata 2005:147; and see Clapham et al. 2007:318.

⁴⁴⁷ Morikawa 2009:59.

⁴⁴⁸ Hirata 2005:145.

⁴⁴⁹ *Ibid.*, 145-146; Morikawa 2009:8, 27; Klein 2008-2009:182.

⁴⁵⁰ Morikawa 2009:9; Iliff 2008:524; Clapham et al. 2007:318; Hirata 2004:190.

⁴⁵¹ Clapham et al. 2007:318; and see Morikawa 2009:13.

4.2.4 - The ‘Science’ and Legality of JARPA

Japan’s whaling operations are ‘facially legal’ under the IWC; Article VIII of the ICRW allows member governments to grant permits for the purpose of killing whales for scientific research (even in designated sanctuaries), and leaves the specifics of these permits entirely in the hands of the member government.⁴⁵² It sanctions the sale of whale meat by stipulating that “[a]ny whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.”⁴⁵³ The ICRW earns more than 85% of its income from the sale of meat in this way.⁴⁵⁴ The soundness and legality of JARPA has, however, been questioned, with the quality of JARPA’s science having a direct relationship to its legality.

The scientific credibility of JARPA is regularly disparaged.⁴⁵⁵ JARPA is criticized for conducting the bare minimum of science on whale carcasses, and for being “designed to gather data to justify the resumption of commercial whaling, rather than to independently analyze data for scientific purposes.”⁴⁵⁶ Clapham et al. condemn JARPA’s use of lethal sampling, arguing that “if a whale can be hit with a harpoon, the same target can just as easily be struck with a biopsy dart.”⁴⁵⁷ The sheer number of whales killed and the absence of any substantial scientific findings has led most to consider JARPA as a commercial rather than a scientific venture.⁴⁵⁸ The IWC has passed several resolutions calling on Japan to abandon JARPA and to revise its scientific program to focus on non-lethal means of research.⁴⁵⁹

The overall legality of JARPA has also been called into question. In 2006, two panels of legal experts convened to consider the legality of JARPA II: an International Panel of Independent Legal Experts met in Paris (‘Paris Panel’) and the Sydney Panel of Independent

⁴⁵² ICRW, Article VIII(1); and see McGrath 2006:1-2.

⁴⁵³ ICRW, Article VIII(2).

⁴⁵⁴ Sand 2008:64.

⁴⁵⁵ See *inter alia* Iliff 2008:523; Sand 2008:56; Clapham et al. 2003:212; Holt 2003a:205; Holt 2003b:449.

⁴⁵⁶ Hirata 2005:136, citing S.J. Mayer, *A Preliminary Review and Evaluation of Scientific Whaling from 1986-1996*, unpublished manuscript; see also Hoek 2010:175-176; Clapham et al. 2007:315; Holt 2003a:205; Clapham et al. 2003:210.

⁴⁵⁷ Clapham et al. 2003.

⁴⁵⁸ Roeschke 2009:106; Klein 2008-2009:201; Schiffman 2001-2002:476.

⁴⁵⁹ See *inter alia* IWC resolutions 1987-1, 1994-10, 1995-8, 1996-5, 1998-4, 1999-3, 2000-4, 2001-7, 2003-2 and 2005-1; for discussion see Anton 2010b; Caprari 2010:1501; Hoek 2010:172; Rothwell 2010:2; Anton 2009:323; McGrath 2006:1; Carlarne 2005-2006:20-21; Schiffman 2001-2002:477.

International Law Experts ('Sydney Panel') held discussions. The Paris Panel concluded that Japan was "conducting purportedly scientific whaling on an increasingly commercial scale which threatens to undermine conservation measures adopted by the Parties to the ICRW and to promote the illegal international trade in whale meat."⁴⁶⁰ The Sydney Panel suggested that Japan's program violated a range of treaties, and that Australia and New Zealand could pursue claims before the Antarctic Treaty (AT) parties.⁴⁶¹ The issue is currently before the International Court of Justice (ICJ).

The first complaint against JARPA II, and one of the principal findings of the Paris Panel, and Australia's chief complaint at the ICJ, is that "Japanese whaling violates the 'abuse of right' and 'good faith' doctrines embraced by the IWC through Resolution 2001-1."⁴⁶² The Paris Panel defined an abuse of right as "a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another state."⁴⁶³ JARPA II also violates "the customary international law principle of *pacta sunt servanda*, codified in the Vienna Convention on the Law of Treaties, requiring that Japan perform its treaty obligation in 'good faith.'"⁴⁶⁴ Those who defend JARPA II, argue that "no such principle even exists under international law."⁴⁶⁵ Regarding the 'abuse of rights' and 'good faith' doctrines, Hoek notes that

the problem associated with these Articles is that they are difficult to enforce. They require compliance only 'as far as possible and appropriate,' and similar to other international law, they suffer from...lack of precision and a lack of ramifications.⁴⁶⁶

International lawyers, including the Sydney Panel, argue that JARPA II may violate the Convention on Biological Diversity (CBD), the preamble of which states that, "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty

⁴⁶⁰ Klein 2008-2009:202, 186.

⁴⁶¹ *Ibid*, p.187 citing the Sydney Panel of Independent International Experts on Japan's Special Permit ('Scientific') Whaling Under International Law 2007; and see discussion in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁴⁶² IWC Res. 2001-1, 'Resolution on Transparency within the International Whaling Commission'; see also Hoek 2010:172.

⁴⁶³ Gillian Triggs quoted by Klein 2008-2009:186; see also Hoek 2010:161, fn. 92, citing Byers 2002.

⁴⁶⁴ Vienna Convention on the Law of Treaties, Art. 26, May 23, 1969, 1155 UNTS 331: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"; see also Moffa 2012:206; Hoek 2010.

⁴⁶⁵ Klein 2008-2009:186.

⁴⁶⁶ Hoek 2010:175.

should not be used as a reason for postponing measures to avoid or minimize such a threat...”⁴⁶⁷ Klein argues that Japan has failed in its obligations to the CBD under Articles 5, 6, 8 and 14.⁴⁶⁸ Sand and others criticize JARPA II for violating CITES, which prohibits the trade of any whale species.⁴⁶⁹ There is also strong evidence to suggest that JARPA II is in violation of UNCLOS, specifically Article 241 which notes that “[m]arine scientific research shall not constitute the legal basis for any claim to any part of the marine environment or its resources.”⁴⁷⁰ The overall legality of JARPA II is therefore decidedly in question.

4.3 - The Legal Context of the Southern Ocean

With respect to the legality of JARPA II, a further set of complications arise from the fact that the program is carried out in the Southern Ocean. Here the Japanese encounter the overlap of an IWC whale sanctuary, the Antarctic Treaty System (ATS) and Australian domestic law. These overlapping legal systems further challenge the legality of JARPA II but also increase the difficulty of states, particularly Australia, in intervening against the program. This is the legal context in which the SSCS and JARPA operate. In 1994, the IWC voted to create a Southern Ocean Whale Sanctuary (SOWS), which prohibits all commercial whaling in the Southern Ocean south of 40 degrees.⁴⁷¹ Japan objected to the SOWS, insisting that it is *ultra vires* of the IWC, and that it violated Article V of the ICRW, which states that sanctuaries must be based on scientific findings and take into consideration the interests of the consumers of whale products.⁴⁷² The following year the IWC voted to ban all scientific whaling within the SOWS and recommended the suspension of all lethal forms of whale research.⁴⁷³

Antarctica represents a complex international political environment; it contains a large sector of unclaimed territory; and three overlapping claims. Most “territorial claims are not

⁴⁶⁷ CBD, 1760 UNTS 79; 31 ILM 818 (1992), Preamble; Hoek 2010:174, 175; Sand 2008; Hutchinson 2006:19.

⁴⁶⁸ Klein 2008-2009:206-207.

⁴⁶⁹ CITES, similar to the IWC, lacks dispute settlement and enforcement mechanisms. See Roeschke 2009:109; Sand 2008:56, 61; Carlarne 2005-2006:24, 46.

⁴⁷⁰ UNCLOS, Article 241; see also Schiffman 2001-2002:480.

⁴⁷¹ Amendment to ICRW Schedule, III.7.c, ICRW art. V:1:c and ICRW 1946 Schedule 7:b; see also Caprari 2010:1499; Berger-Eforo 1996:439.

⁴⁷² ICRW Schedule, Art. V.2.b and d.

⁴⁷³ See IWC Resolution 1995-8, “Resolution on Whaling under Special Permit in Sanctuaries”; and IWC Resolution 1995-9, “Resolution on Whaling under Special Permit.”

recognized by non-claimant States representing the great majority of the international community.”⁴⁷⁴ The continent also challenges traditional understandings of sovereignty. *Inter alia*, the harsh climate provides a challenge to the continuous display of authority. The AT and the ATS, which comprises the additional treaties and agreements that have built up around the AT, have been developed as a means of addressing some of the political challenges presented by the southern continent. The AT is in effect an agreement to disagree; it makes no effort to resolve the conflicting territorial claims in Antarctica, but rather ‘freezes’ the legal *status quo*.⁴⁷⁵ Article IV, stipulates that “[n]o acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica...”⁴⁷⁶ Furthermore, no new claim or enlargement of an existing claim can be made with the Treaty in force.⁴⁷⁷ The ATS has “proved remarkably resilient” and serves as an example of a successful ‘framework treaty.’⁴⁷⁸

The ATS presents a significant challenge to the Australian government within whose waters most of JARPA is conducted. Australia has claimed territory in Antarctica, the Australian Antarctic Territory (AAT), since 1936. This claim covers 42% of the Antarctic mainland, but is only recognized by France, New Zealand, Great Britain, and Norway.⁴⁷⁹ Australia passed the Whale Protection Act in 1980, which specifically applied to Australian nationals in all Australian waters, but only to non-nationals within the Australian Fisheries Zone, not comprising the waters around the AAT.⁴⁸⁰ In 1999 Australia’s Environment Protection and Biodiversity Conservation Act (EPBC) created the Australian Whale Sanctuary (AWS), and made it “an offense to kill, injure or interfere with a cetacean” within the exclusive economic zone (EEZ) of Australia, including the AAT.⁴⁸¹ The AWS also overlaps with portions of the SOWS, and within “Australia’s EEZ, the *EPBC Act* applies both to Australians and to nationals of other countries.”⁴⁸²

⁴⁷⁴ Crawford and Rothwell 1990-1991:55, 57; and see Davis 2007:148.

⁴⁷⁵ Anton 2007-2008:20; and Crawford and Rothwell 1990-1991:54, 59.

⁴⁷⁶ AT, Article IV (2), 1959.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ Anton 2007-2008:17.

⁴⁷⁹ The AAT comprises of land lying south of latitude 60° South (to the South Pole), and between longitudes 45°-136° and 142°-160° East. See Caprari 2010:1504; McGrath 2006:1.

⁴⁸⁰ Whale Protection Act, Act No. 92 of 1980. See Epstein and Barclay 2013:109; Anton 2009:328.

⁴⁸¹ Environmental Protection and Biodiversity Conservation Act §3[2][e]iii 1999; see Caprari 2010:1504; Hutchinson 2006:6; McGrath 2006:2.

⁴⁸² Davis 2007:156; and see Anton 2009:330; Jabour and Iliff 2009:272.

This presents Australia with a dilemma. As Mossop elaborates, “[u]nder Australian federal law, killing or injuring whales in the EEZ is prohibited and attracts penalties including fines or imprisonment. Much of the Japanese scientific whaling programme takes place in Australia’s EEZ off the AAT, *prima facie* breaching Australian law.”⁴⁸³ Australia’s jurisdiction to enforce the EPBC is uncertain. Australia declared its EEZ in 1994, including the EEZ of the AAT.⁴⁸⁴ The question is whether Australia has the jurisdiction to intervene against Japanese ‘research’ whaling, which clearly contravenes the EPBC?

There has been considerable debate on this subject – whether enforcing an existing law constitutes a new sovereignty claim and as such whether Australia would legally be able to act against the Japanese without violating or upsetting the ATS.⁴⁸⁵ The ATS comprises not only the AT, but also several other conservation agreements, including the Madrid Protocol on Environmental Protection to the Antarctic Treaty, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), and the Convention for the Conservation of Antarctic Seals (CCAS).⁴⁸⁶ One concern, noted by Anton, is that if Australia were to assert jurisdiction in the AWS, it would do so at the risk of the “continuing stability of the Antarctic Treaty System (ATS) and the broader environmental values it serves.”⁴⁸⁷

As a result of this dilemma, Australia has sought to avoid controversy, and until 2007, laws were generally “not enforced against foreign nationals.”⁴⁸⁸ In the 2007 federal election, the Australian Labour party pledged to “enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary.”⁴⁸⁹ Following the election, the government appointed a special whale envoy to Japan, whose 2009 visit to Japan was deemed unsuccessful and not repeated.⁴⁹⁰ It is interesting to note that from the initial JARPA survey until 2007, the government was content to ignore Japanese ‘research’ whaling within its waters. The two things which changed over this time were the increased public awareness of the issue and resulting pressure in large part brought

⁴⁸³ Mossop 2005:759.

⁴⁸⁴ Davis 2007:155.

⁴⁸⁵ See *inter alia* *ibid.*, p.143, 153-154; Caprari 2010:1504; Anton 2008; Crawford and Rothwell 1990-1991:79-80.

⁴⁸⁶ Madrid Protocol, 30 ILM 1455 (1991); CCAMLR, 33 UST 3476; 1329 UNTS 48; 19 ILM 841 (1980); CCAS, UKTS 45 (1978), Cmnd.7209 / 29 UST 441 / 11 ILM 251 (1972), available at http://www.ats.aq/e/ats_keydocs.htm (accessed July 3, 2013); and see Hutchinson 2006:21; Crawford and Rothwell 1990-1991:69.

⁴⁸⁷ Anton 2009:350; see Anton 2007-2008:17; Hutchinson 2006:23.

⁴⁸⁸ Davis 2007:157; and see Anton 2009:335; Jabour and Iliff 2009:271.

⁴⁸⁹ Anton 2007-2008:19.

⁴⁹⁰ Epstein and Barclay 2013:110-111.

on by sustained SSCS campaigns, and a law suit brought by HSI in 2004. The HSI sought an injunction and a declaration against Kyodo for illegally whaling under Australian federal law.⁴⁹¹ In the HSI case the initial ruling was consistent with the idea that Australian action against Kyodo would “prompt a significant adverse reaction from other Antarctic Treaty Parties.”⁴⁹² The case was appealed, and in 2008 the Australian Federal Court issued declaratory relief and an injunction against Kyodo.⁴⁹³ The court found the whaling company had “breached sections 229-232 and 238 of the EPBC Act by killing, treating, and possessing whales in the AWS in the EEZ adjacent to the Australian Antarctic Territory.”⁴⁹⁴ The Australian Attorney-General, in 2008, took the view that an “attempt to enforce the EPBC Act may upset the diplomatic status quo under the Antarctic Treaty and be contrary to Australia’s long term national interests, including its interests connected with its claim to territorial sovereignty in Antarctica.”⁴⁹⁵

Australia and Japan are very close trading partners. Both governments have been loath to jeopardise this relationship for a relatively secondary issue such as whaling.⁴⁹⁶ However, despite this and a long history of inaction on the part of the Australian government, Australia has recently decided to pursue the issue. In May 2010, Australia initiated proceedings against Japan in the ICJ, asserting that Japan was violating its obligation under the ICRW to observe the moratorium on commercial whaling, to act in good faith, and to refrain from commercial whaling in the Indian and Southern Ocean Sanctuaries.⁴⁹⁷ Australia further asserted that Japan was violating obligations under the CBD to ensure that activities under their jurisdiction do not cause damage to the environment of other states.⁴⁹⁸ Japan’s position is based “on a plain interpretation of the language of the ICRW,” one which strictly defines the purpose of the IWC as a body for regulating whaling, rather than whale conservation.⁴⁹⁹ The outcome of this case is pending.

⁴⁹¹ Anton 2009:333; Klein 2008-2009:180; Anton 2007-2008:18; Hutchinson 2006:23; McGrath 2006:4.

⁴⁹² Justice Allsop quoted by Anton 2009:335.

⁴⁹³ Ryan 2011:21; Anton 2009:337; Roeschke 2009:113-114; Davis 2007:157.

⁴⁹⁴ Anton 2009:333.

⁴⁹⁵ McGrath 2008; see also Anton 2007-2008.

⁴⁹⁶ Hoek 2010:188.

⁴⁹⁷ Rothwell 2010.

⁴⁹⁸ *Ibid.*, p.4; see also ICJ, “Pending Cases,” available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148> (accessed July 3, 2013).

⁴⁹⁹ Moffa 2012; Hutchinson 2006:22-23.

4.4 - Anti-Whaling and Conventional INGO/TAG Strategies

Several general observations can be made from this overview. First, the IWC is incapable of enforcing its own decisions and is mired in a political deadlock, making any reforms virtually impossible. Lobbying efforts within the IWC on the part of INGOs and TAGs appear to be of little use given the organization's failings. This suggests that conventional INGO/TAG insider strategies such as lobbying, scientific reporting, or even monitoring, have little impact. Information politics are ineffective in an era of 'moral management.'⁵⁰⁰

The transnational campaign against whaling was initially very successful; activists achieved successes in disseminating a powerful anti-whaling norm around the world, and worked hard within the IWC to obtain the current moratorium. While the vast majority of people living in anti-whaling states oppose whaling, the anti-whaling norm has yet to resonate in staunchly pro-whaling states. It seems that if conventional awareness raising and re-framing by INGOs/TAGs were to work in countries such as Japan and Norway, they would have indeed done so by now, or that such strategies require such considerable time that they are essentially ineffective. Image events, which served to mobilize anti-whaling sentiment in other states, may even have the contrary effect of strengthening pro-whaling sentiment by being linked to cultural issues and to patriotism.

Similar reasoning suggests the use of moral leverage as ineffective; efforts at shaming Japan into compliance with the global anti-whaling norm are met with accusations of cultural imperialism. The Japanese government can use its pro-whaling position to appear strong in the face of *gaiatsu* – foreign pressure.⁵⁰¹ Efforts to portray whaling as a moral issue have had no resonance where whaling is synonymous with fishing and whale meat is considered another type of acceptable seafood. Japanese are quick to point out that Westerners who are critical of Japanese whaling eat burgers and support a factory farming system which is even crueler than whaling.⁵⁰² The use of material leverage is also limited. INGOs/TAGs appear incapable of organizing boycotts on a sufficient scale to have an impact on holdouts like Japan and Norway. Anti-whaling activists appear incapable of leveraging the US into using unilateral economic

⁵⁰⁰ Strausz 2007 quoting Mitchell 1998:144.

⁵⁰¹ Sand 2008:68.

⁵⁰² See for example Suhre 1999-2000:321; Stoett 1997:113; Kalland 1993b:4.

sanctions, one of the traditional *ad hoc* enforcement mechanisms of the IWC.⁵⁰³ Conventional strategies were unable to make progress against hold-out pro-whaling states like Japan. The SSCS has adopted an unconventional approach as a means of circumventing the deadlock which has plagued the whaling issue to achieve direct results.

⁵⁰³ Sand 2008:68.

CHAPTER 5 – OBSERVATIONS OF SSCS OPERATIONS

This chapter examines SSCS strategy in detail. It provides background information on the SSCS's philosophy and history, both of which have influenced the development of SSCS strategy. It then explores how the SSCS articulates its goals and the strategy it claims to use to accomplish these goals. A survey of existing evaluations of the legality of SSCS actions follows. The remainder of the chapter focuses specifically on the Antarctic anti-whaling strategy of the SSCS. It begins with a short history of the SSCS anti-whaling campaign, and then provides a chronology of 'Operation No Compromise.' This is followed by observations made during the Operation, which are organized into sub-sections using Keck and Sikkink's four categories of INGO/TAG action, though as will become evident, many of the SSCS actions fall outside of this typology, and suggest its expansion.

5.1 - The Sea Shepherd Conservation Society

5.1.1 - *The Philosophy of the SSCS*

Understanding the general philosophy of the SSCS is important in so far as this philosophy drives and limits certain strategic and tactical choices. Classifying the underlying philosophy of the SSCS is somewhat confused by its use of animal rights rhetoric, its focus on specific marine species, and by the strong involvement of animal rights/liberation activists within the organization, and by the large number of animal rights/liberation oriented donors it attracts.⁵⁰⁴ The organization engages in campaigns, such as the Dam and Cove Guardians, which appear to be principally motivated by animal rights/liberation, rather than conservation concerns. However the organization remains conservation focused – concerned with protecting the environment, ecosystems, and with preserving species, due in large part to the central role played by Watson and the centrality of his beliefs and philosophy with that of the SSCS.

⁵⁰⁴ Likar 2011:94. A high percentage of the crew of 'Operation No Compromise' were motivated by issues of animal rights/liberation, and debates around veganism were common. See for example Field Journal: November 24, 26, and 28, 2010; January 27, 2011; and Cornelissen, February 26, 2011.

Watson describes deep ecology as central to his own philosophy, noting that rather than being conquerors of Earth, humans must be “plain citizens upon it, equal to other citizen species.”⁵⁰⁵ Deep ecology advocates biocentrism, wherein the environment is considered to be “intrinsically valuable in and of itself” and the wellbeing of ecosystems a priority.⁵⁰⁶ Deep ecology and its adherents have often been described as misanthropic, and this is an adjective which Watson accepts.⁵⁰⁷ Watson is consistently biocentric in his treatise ‘On Natural Law,’ wherein he enumerates the three laws of ecology (summarized as interdependence, diversity and finite resources) and explains how these laws take precedent over manmade laws.⁵⁰⁸ Human laws cannot violate ecological laws without “terrible justice rendered against us by the Earth herself.”⁵⁰⁹ Deep ecology leaves little room for compromise, and calls for adherents to take action to prevent environmental harms. This exhortation to action can be seen in *Neptune’s Manifesto*.⁵¹⁰ Along these lines, Watson declares that there can be ‘no compromise’ and named the 2010-2011 campaign – ‘Operation No Compromise.’⁵¹¹

The SSCS’s position on violence and the destruction of property places limitations on its strategy, which in turn informs its choice of tactics. Violence is a contested term and highly politicized. The major point of contention in the debate over the definition of violence is the question of whether violence includes acts committed against property. Chenoweth and Stephan *inter alia*, define violence as “other types of physical harm of people and property.”⁵¹² Many contest the inclusion of damage to property within the definition of violence.⁵¹³ The SSCS’s position on property destruction, as articulated by Watson, is that this is legitimate 1)

⁵⁰⁵ Paul Watson quoted by Essemli with Watson 2013:54.

⁵⁰⁶ Nagtzaam and Lentini 2008:110-133, 115, citing Castree 2002:113.

⁵⁰⁷ Cameron 2009: 26, 1:14:44; and see Watson 1988:82.

⁵⁰⁸ Watson 1988; Watson, as told to Rogers 1982:154.

⁵⁰⁹ Watson 1988:82.

⁵¹⁰ Watson 1998.

⁵¹¹ Watson 2003:107. The Earth First! slogan is “No Compromise in Defense of Mother Earth!”; see Scarce 2006:24; *No Compromise: The Militant, Direct Action Publication of Grassroots Animal Liberationists & their Supporters*, is the name of an animal liberation publication, available at <http://www.nocompromise.org/> (accessed July 8, 2013).

⁵¹² Chenoweth and Stephan 2011:13; see also Carter 2005:39.

⁵¹³ Edward Abbey quoted by Rowell 1996:152; see also Graeber 2009:177; Vanderheiden 2008:315; Scarce 2006:11-12; Best and Nocella 2004:25; Rootes 2000:35-36; Cohen 1997:174; Foreman 1987:14.

because “[t]he right of living things to live is more important than the right of living things to possess property”⁵¹⁴; and 2) that the “object in question is used *illegally* to destroy life.”⁵¹⁵

While violence against property may be justified, the SSCS avoids all actions which could endanger lives. The organization maintains a strict code of non-violence, following the principles that crew members “cannot use weapons; they cannot use explosives; they cannot undertake any action that could result in a physical injury to humans; they must take responsibility for their actions; and they must accept moral and legal consequences for their actions.”⁵¹⁶ During ‘Operation No Compromise,’ crew members were briefed to take extreme care to avoid harming Japanese whalers. During a briefing, crew members were instructed not to “do anything which endangers lives” in the event of a boarding, such as pushing boarders off the ships rails,⁵¹⁷ and throwers (of butyric acid and cellulose) were instructed to aim away from people.⁵¹⁸ Not only are these measures consistent with deep ecology, but they are also pragmatic.⁵¹⁹ If the SSCS were ever to injure or kill someone, Watson notes, “we would be condemned by our governments; there’s no way they would justify it.”⁵²⁰ The SSCS walks a fine line, because creating casualties would push the organization into the category inhabited by terrorists.

5.1.2 - History of the SSCS and its Anti-Whaling Campaigns

Watson was the youngest founding member of Greenpeace and split with this organization in 1977 after a disagreement concerning the role of property destruction during actions.⁵²¹ As a result, there has been constant acrimony between the two organizations.⁵²² Jabour

⁵¹⁴ Watson 1988:83; and see Watson 1993b:172; Watson as told to Rogers 1982:26-27, 155; Field Journal, though Hammarstedt took the position that violence cannot be committed against property, February 23, 2011.

⁵¹⁵ Emphasis added. Watson quoted by Essemli with Watson 2013:109; see also Watson quoted in Best and Nocella 2004:33; Watson 1993b:172.

⁵¹⁶ Manes 1990:111; see also Watson quoted by Essemli with Watson 2013:109; Watson quoted in Cameron 2009; Roeschke 2009:127; Scarce 2006:106; Watson 1998; Watson 1988:86.

⁵¹⁷ Field Journal, anti-boarding briefing, Cornelissen, December 20, 2010.

⁵¹⁸ *Ibid*, ‘Rules of Engagement Briefing’, Hammarstedt, December 28, 2010.

⁵¹⁹ *Ibid*, Burke, February 14, 2011.

⁵²⁰ Cameron 2009:6.

⁵²¹ Weyler 2004:457; and see Watson 1993a.

⁵²² For Watson calling Greenpeace the ‘Avon Ladies’ of the environmental movement see *inter alia* Watson quoted by Essemli with Watson 2013:70; Khatchadourian 2007; and for Greenpeace excluding Watson from historical

and Iliff explain the basis of this animosity as being tied to the fact that both organizations are in direct competition for public donations and supporters, and we can see that through such criticism each organization is seeking to establish their specific niche.⁵²³ After leaving Greenpeace, Watson set his sights on pirate whaling, and specifically the *Sierra*, a vessel with complicated international ownership which had been whaling illegally since 1967.⁵²⁴ With help from Cleveland Amory's Fund for Animals, Watson purchased the *Sea Shepherd*. On July 16, 1979 off the coast of Portugal, he rammed and disabled the *Sierra*, which was allowed to struggle into Lisbon harbour.⁵²⁵ Eight months after the ramming, the repaired *Sierra* was sunk at dockside in Lisbon harbour by the use of limpet mines.⁵²⁶ Watson later claimed that SSCS operatives were responsible for the action.

The SSCS was formed in the United Kingdom (UK) in 1979 as a support group for the ship. The newly minted SSCS aggressively targeted other pirate whalers and achieved considerable success. In May 1980, the *Susan* and *Theresa*, sister ships of the *Sierra*, were seized by the South African government after the SSCS "documented that they were engaged in pirate whaling."⁵²⁷ In the spring of 1980, SSCS activists sank, at dockside, two Spanish whalers—*Ibsa I* and *II*, which constituted 40% of the Spanish whaling fleet.⁵²⁸ The Spanish whaler *Astrid* was quietly retired by her owners after the SSCS offered a \$25,000 USD 'bounty' for anyone who would sink the vessel.⁵²⁹ These actions effectively ended pirate whaling in the North Atlantic.

Over the next decade the SSCS campaigned on other marine conservation issues, and continued to pursue both legal and pirate whaling. It used a range of strategies in its fight against whaling – from the classic INGO/TAG monitoring and 'naming and shaming,' such as documenting Soviet misrepresentation of 'subsistence whaling' in 1981,⁵³⁰ to more

accounts and maintaining a page on its website distancing themselves from Watson see Erwood 2011; Greenpeace USA, "Paul Watson, Sea Shepherd and Greenpeace: Some Facts," December 17, 2008, available at <http://www.greenpeace.org/usa/en/news-and-blogs/news/paul-watson-sea-shepherd-and/> (accessed November 21, 2011); Ryan 2009:164.

⁵²³ Stuart et al. 2013:22; Jabour and Iliff 2009:276; Ryan 2009:168.

⁵²⁴ Over the course of the *Sierra*'s career the vessel had numerous names, owners and flags. See Scarce 2006:97; Darby 2007:121; Day 1987:23-24.

⁵²⁵ See *inter alia* Cameron 2009: 20; Scarce 2006:97-99; Watson 1994:12; Watson as told to Rogers 1982:175; Day 1987:55; Jenkins et al. 1983:17.

⁵²⁶ See Scarce 2006:100; Watson 2003:136; Manes 1990:16, 111-113; Day 1987:53, 57.

⁵²⁷ Day 1987:50.

⁵²⁸ *Ibid.*, 63; Darby 2007:122-123; Scarce 2006:100; Watson as told to Rogers 1982:250.

⁵²⁹ All prices in UDS unless otherwise specified. Darby 2007:122-123; Watson 1993c:178.

⁵³⁰ Watson 1994:39, 46, 69-70.

confrontational approaches, such as the 1986 ‘raid on Reykjavik.’ Here two SSCS activists attacked whaling infrastructure in Iceland, vandalizing a whale processing plant, and then proceeded to sink half of the Icelandic whaling fleet – the *Hvalur 6* and *Hvalur 7* – in Reykjavik Harbour. The action was estimated to have caused upwards to \$8 million in damages.⁵³¹ As a result of this action, Watson and the SSCS were banned from attending future meetings of the IWC.⁵³² If the SSCS had truly desired to build towards adopting an insider strategy, this would seem to be the exact opposite way to go about it.

In December 1992, Watson and others opened the sea valves on the Norwegian whaling vessel *Nybraena*, the following month the Norwegian whaler *Senet* was also sunk.⁵³³ That same year the SSCS returned to Norway with the brightly-painted *Whales Forever*, and attempted to enter a Norwegian harbour, but was intercepted and ordered to halt by the Norwegian cutter *Andenes*.⁵³⁴ In the ensuing engagement, the two vessels collided, and the Norwegians fired live warning rounds and used depth charges in a failed attempt to stop *Whales Forever*.⁵³⁵ Some scholars claim that the SSCS actions against Norway represented “a public relations disaster for the (always modest) anti-whaling forces in that country.”⁵³⁶ As an ‘image event,’ SSCS actions in this case appear to have alienated rather than won over a Norwegian audience. The SSCS actions did, however, have a direct impact on Norwegian whaling. Bailey notes that as a result of the SSCS sinkings of Norwegian ships “insurance companies were said to be denying coverage to whaling vessels on the grounds that those vessels were operating under conditions of war.”⁵³⁷

⁵³¹ Darby 2007:179; Watson 1994:151; Watson 1993b:175; Day 1987:132, 135.

⁵³² IWC, media release, “Chair’s Report of Intersessional Meeting on Future of the IWC,” Heathrow, UK, March 6-8, 2008; IWC archives, excerpt from letter from IWC Secretary Nicky Grady, Sorrento 2004 meeting; see also Roeschke 2009:107-108; Khatchadourian 2007; MacLeod 1994:103.

⁵³³ Darby 2007:181-182.

⁵³⁴ *Ibid.*; and see Watson 1994: 258.

⁵³⁵ Darby 2007:183; Scarce 2006:266-267.

⁵³⁶ Bailey 2008:312.

⁵³⁷ *Ibid.*

5.2 - The SSCS Antarctic Anti-Whaling Campaign

5.2.1 - History of Operations

In 2002-2003 the SSCS launched its Antarctic anti-whaling campaign. The specific goal was “to enforce the global moratorium against commercial whaling and to enforce the protection regulations granted to the whales inside the official Southern Ocean [Whale] Sanctuary.”⁵³⁸ Towards accomplishing this broad goal the SSCS described two specific objectives of its campaigns: “First to save the lives of as many whales as possible, and second to sink the Japanese whaling fleet economically.”⁵³⁹ The initial 2002-2003 operation was unsuccessful in locating the whaling fleet, and the SSCS did not launch a subsequent operation until 2005-2006. Since 2006 operations have been run annually.

During its Antarctic campaigns, the SSCS employs a wide range of tactics aimed at disrupting whaling operations. The ultimate goal of SSCS operations is to block the slipway of the *Nisshin Maru* factory ship, and thereby prevent all whales from being loaded and as a result, halt whaling operations.⁵⁴⁰ The SSCS also attempts to disrupt whaling through other forms of harassment, which include throwing canisters of butyric acid (stink bombs, which contaminate whale meat and make decks unworkable) and cellulose powder (to makes decks slippery), deploying prop-foulers (to disable whaling vessels by entangling prop fouling lines in their propellers), and sending activists to board whaling ships (which cause diplomatic delays).⁵⁴¹ Several collisions between Sea Shepherd and whaling vessels have also occurred over the years. None of these actions has resulted in any casualties or injuries to either activists or their targets. Operations have been documented by the television program *Whale Wars* since the 2007/2008 operation.

⁵³⁸ SSCS, “Operation Devine Wind – Campaign History,” available at <http://www.seashepherd.org/campaigns/operation-divine-wind/operation-divine-wind/campaign-history-15> (accessed January 22, 2013).

⁵³⁹ SSCS, “Japanese Whalers Confirm Sea Shepherd’s Effectiveness,” October 2, 2012, available at <http://www.seashepherd.org/news-and-media/2012/10/03/japanese-whalers-confirm-sea-shepherds-effectiveness-1445> (accessed August 22, 2013); and see Paul Watson, “Editorial: The End of Japanese Whaling in the Southern Ocean is in Sight,” SSCS, November 19, 2009, available at <http://www.seashepherd.fr/news-and-media/editorial-091119-1.html> (accessed August 23, 2013).

⁵⁴⁰ Whale meat goes bad after 10 hours in the water. *Field Journal*, November 27, 2010; Bethune 2010:56.

⁵⁴¹ Bethune 2010:108.

5.2.2 - Operation No Compromise – Details and Chronology

This section contains a brief chronological outline of ‘Operation No Compromise,’ in order to provide context for observations and to provide a clear picture of a complete SSCS operation. Some of the events described in the chronology are developed in greater detail below, as they refer to specific aspects of SSCS strategy.

5.2.2.1 - Participating Vessels

PO was conducted from November 23, 2010 to March 9, 2011 which included the entire duration of ‘Operation No Compromise’ (December 2, 2010 to March 6, 2011). The SSCS fleet for the operation comprised of three vessels:

- *MY Steve Irwin*: Dutch registered. 59m, 885 gross register tonnage (GRT). Former Scottish Fisheries Protection Agency vessel, acquired by SSCS in 2005. Captained by Paul Watson (Canadian). Deploying two RIBs, one zodiac, one Jet Ski, and a 4-person helicopter.
- *MY Bob Barker*: Dutch registered. 52m, 801 GRT. Former Norwegian whaler, acquired in 2009. Captained by Alex Cornelissen (Dutch). Deploying two RIBs and equipped with helipad.
- *MV Gojira* (currently *MV Brigitte Bardot*): Australian registered. 35m, 41 GRT. Stabilized mono-hull trimaran. Captained by Lockhart "Locky" MacLean (Canadian). Capable of reaching speeds in excess of 24 knots, faster than the whaling fleets harpoon vessels. Deploying one emergency Jet Ski.

Both of the SSCS large vessels are protected by anti-boarding spikes, are painted black and are emblazoned with the SSCS website address. I conducted PO while serving on the deck crew of the *Bob Barker*. The role of a deck crew member involved daily non-mechanical maintenance of the vessel. The deck crew were also responsible for launching the small boats during actions, were assigned a role on the vessel’s firefighting and anti-boarding teams, helped to manufacture various tactical items (prop-foulers, smoke flares etc.), and generally supported the activities of the vessel.

The Japanese whaling fleet has varied over the years. In 2010-2011 it comprised of:

- *MV Nisshin Maru*: Japanese registered. 130m, 8030 GRT. Factory ship.
- Three harpoon vessels: the *MV Yushin Maru (YM#1)*, *Yushin Maru #2 (YM#2)* and *Yushin Maru #3 (YM#3)*: Japanese registered. 70m, 750 GRT. Harpoon vessels. The *YM#3* was equipped with a water canon in lieu of a harpoon and served as the whaling fleet's security vessel. Hammarstedt described the general behavior of these vessels as clumsy, quiet, and very aggressive respectively.⁵⁴²
- *Sun Laurel*: Panamanian registered, Korean owned. 104m, 4067 GRT. Oil tanker, fleet's re-fueling vessel.

All of the whaling vessels (which excludes the tanker) were protected by defensive netting, and equipped with water hoses, and emblazoned with the English word 'Research.'

5.2.2.2 - Chronology

The SSCS fleet departed from Hobart, Australia, and dispersed.⁵⁴³ The *Bob Barker* spent the first month of the campaign in the Southern Ocean engaging in training and in search of the whaling fleet. This time was also spent developing new tactics; two innovative tactics developed during campaign were 'Mick Jagers' – smoke flares with hooks attached such that they would become caught in the whaling vessels protective netting, and 'Shepherd's Crooks' – long metal hooks connected to a prop-fouler by a length of chain.⁵⁴⁴

A harpoon vessel was first encountered by the *Bob Barker* in the Ross Sea on December 31, 2010.⁵⁴⁵ The harpoon vessel proceeded to shadow the *Bob Barker*, from December 31, 2010 to February 5, 2011, in spite of several attempts to delay and disable it through the use of prop-foulers and other tactics. During this time, the *Steve Irwin* was similarly shadowed. Tailing harpoon vessels prevented SSCS vessels from finding the *Nisshin Maru* by relaying the SSCS vessel's positions to the factory ship, and as a result, a tactical deadlock emerged. Many of the

⁵⁴² Field Journal Hammarstedt, December 18, 2010.

⁵⁴³ For a more detailed chronology see Phelps Bondaroff 2011.

⁵⁴⁴ Field Journal, for 'Mick Jagger's' see January 4, 2011; for Shepherd's Crooks see January 2, 2011; and see Phelps Bondaroff 2011:27, fn.47.

⁵⁴⁵ *Ibid*, and Daily Action Log, December 31, 2010.

crew members expressed satisfaction with this deadlock because the SSCS was succeeding in tying up two thirds of the whaling fleets resources, which would otherwise be whaling.⁵⁴⁶

In mid-January, as a means of breaking the tactical deadlock, the SSCS launched a RIB operation and succeeded in attaching a tracking device to the hull of the *YM#2*.⁵⁴⁷ The harpoon vessel was tracked back to the *Sun Laurel*, a ship chartered to refuel the whaling fleet. The SSCS argued that refueling below 60°S violates the ATS, and all three of the SSCS vessels converged upon the *Sun Laurel*.⁵⁴⁸ The *Bob Barker* blockaded the vessel, preventing any refueling from January 13 to 20, 2011. The *Bob Barker* disengaged from the tanker once it had been pursued outside of the SOWS.⁵⁴⁹

On the evening of February 9, 2011 the *Gojira* located the *Nisshin Maru* and a short time later the *Bob Barker* assumed a position behind the slipway of the factory ship, a position it maintained from February 9 to 19, 2011, preventing all further whaling.⁵⁵⁰ The *Nisshin Maru* travelled east, which drew it ever closer to the Drake Passage, well outside the ICR's designated whaling area. The Antarctic Peninsula includes the overlapping territorial claims of several states, and as a result the Drake Passage is a veritable political mine field of overlapping EEZs.⁵⁵¹ The first EEZ the Japanese would enter, if they attempted to navigate the Passage, would have been that of Chile, a member of the Buenos Aires Group, a caucus within the IWC of member states with very strong anti-whaling positions.⁵⁵² Entering the Chilean EEZ transporting whale meat or whaling would constitute a violation of Chilean domestic laws.⁵⁵³ On February 18, 2011, the *Nisshin Maru* abruptly turned north, just prior to entering the EEZ of Chile's Antarctic claim –unwilling to test the staunchly anti-whaling Chilean government's threats that it would be arrested if it entered Chile's EEZ. On the same day, the Japanese government announced an early end to their whaling season. The fleet returned almost a month earlier than previous

⁵⁴⁶ Field Journal, Gary Stokes, photographer on *Bob Barker*, January 14, 2011.

⁵⁴⁷ *Ibid*, description of tracking device action, January 9-10, 2011.

⁵⁴⁸ See *ibid*, and Daily Action Log, January 12, 2011.

⁵⁴⁹ See *ibid*, 'Operation Pancake', January 20, 2011.

⁵⁵⁰ See *ibid*, and Daily Action Log, February 9, 2011.

⁵⁵¹ See *ibid*, Cornelissen, February 26, 2011.

⁵⁵² See "Declaration of the Buenos Aires Group: The Conservation of Cetaceans in the 21st Century and the International Whaling Commission," Ilha do Papagaio, Brazil, April 24-26, 2008, available at http://en.mardecetaceos.net/media_files/download/GBADeclarationFinal2008.pdf (accessed April 6, 2011).

⁵⁵³ Government of Chile, "Protege a los Cetáceos e Introduce Modificaciones a la Ley No. 18.892 General de Pesca y Acuicultura," LÉY Núm. 20.293 (October 25, 2008).

seasons. Japanese officials declared that the reason for their departure was “due to repeated harassment from activists at sea.”⁵⁵⁴

The *Bob Barker* disengaged from the *Nisshin Maru* and set a course for Hobart, where it arrived on March 6, 2011, and was briefly detained and searched by the Australian Federal Police (AFP).⁵⁵⁵ This was pursuant to a formal request which the Australian government had received from Japan, regarding Australia’s obligation under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) to “ensure that appropriate action is taken against persons committing unlawful acts against ships.”⁵⁵⁶ The SSCS cooperated with AFP officers by providing them with copies of the ship’s log and Animal Planet provided copies of its footage.

5.3 - Observations of the SSCS

This section (5.3) explores SSCS strategy, drawn both from observations made during field work and an examination of previous SSCS operations. It explores how each component of SSCS’s anti-whaling campaign fits into the existing INGO/TAG literature. The SSCS does engage in information, symbolic, leverage and accountability politics, however its use of these forms of action does not closely resemble those of other INGOs/TAGs. From this examination, we can begin to see that aspects of SSCS strategy resemble the strategy of DA, a strategy which is more commonly associated with the repertoires of domestic radical groups (explored in Chapter 6). Explaining SSCS strategy as a form of DA applied to the international arena and the high seas has explanatory power: however it still fails to explain all aspects of SSCS strategy, leading to the formulation of SSCS strategy as direct enforcement (DE), which is developed in Chapter 7.

⁵⁵⁴ See *supra* note 2.

⁵⁵⁵ Field Journal, March 6, 2011.

⁵⁵⁶ International Maritime Organization, “SUA Convention,” available at [http://www.imo.org/OurWork/Facilitation/SUA Convention/Pages/Default.aspx](http://www.imo.org/OurWork/Facilitation/SUA%20Convention/Pages/Default.aspx) (May 6, 2011); see also warrant issued by AFP to SSCS vessels, “Commonwealth of Australia Crimes Act 1914: Section 3E: Search Warrant for Premises or a Conveyance,” Issued by Peter Southwell, and signed over to Timothy Dawe (AFP 18828), 15:11, March 3, 2011.

5.3.1 - Information Politics

The SSCS's use of information and framing can be contrasted with that of other anti-whaling INGOs/TAGs. At the 2011 meeting of the IWC, activists provided technical reports on the toxicity of whale meat,⁵⁵⁷ the cruelty of whaling,⁵⁵⁸ the hunting and sale of endangered species,⁵⁵⁹ and the importance of whale conservation.⁵⁶⁰ SSCS communications contain information relating to the conservation status of whales, and often mention the cruelty of whaling, however this kind of information is far removed from being technical and detailed, nor is it central the SSCS message. The information disseminated by the SSCS appears to be designed to frame its actions as law enforcement. The SSCS does this in two ways; first, it provides legal justification for its overall approach – a legal mandate to enforce international law, and secondly, it provides information concerning the legality of the actions of its targets, judging these actions to be illegal and thereby justifying enforcement actions against them. The SSCS also releases information concerning the effectiveness of its campaigns, i.e. the number of whales its actions purport to have saved (see Direct Impacts of SSCS Actions on Japanese Whaling, Chapter 5.3.3.1 below).

5.3.1.1 - Legal Justifications

Watson claims that “Sea Shepherd’s empowered to intervene by virtue of the United Nations World Charter for Nature, which allows for NGOs and individuals to uphold international conservation law.”⁵⁶¹ Specifically, the SSCS points to Section 21 of the United Nations World Charter for Nature (WCN) which declares that,

⁵⁵⁷ Booklet distributed at 2011 IWC meeting, Sandra Alther, and Sigrid Lüber, “Toxic Menu: Contamination of Whale Meat and Impact on Consumer’s Health,” Ocean Care and Pro Wildlife, 2009; and see joint briefing paper for IWC meeting by 12 different anti-whaling INGOs, “Agenda Item 13 – Environmental and Health Issues: Recent Developments on Human Health Risks from the Consumption of Cetacean Products.”

⁵⁵⁸ Materials distributed at 2011 IWC meeting, World Society for the Protection of Animals (WSPA), “Whaling: Defying International Commitments to Animal Welfare?”

⁵⁵⁹ Booklet distributed at 2011 IWC meeting, Environmental Investigation Agency and Whale and Dolphin Conservation Society, “Renegade Whaling: Iceland’s Creation of an Endangered Species Trade.”

⁵⁶⁰ WWF, “WWF Position Statement,” 63rd IWC Meeting, Jersey, July 11-14, 2011.

⁵⁶¹ Watson in *Whale Wars*, Operation Bluefin, 14:40 (aired April 21, 2012).

...states and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall: (a) co-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations...and (e) Safeguard and conserve nature in areas beyond national jurisdiction...⁵⁶²

And Section 24 which further stipulates that,

Each person...acting individually, in association with others or through participation in the political process...shall strive to ensure that the objectives and requirements of the present Charter are met.⁵⁶³

This has not always been the strategy adopted by the SSCS. As Watson notes, he started the SSCS “five years before the Charter came into existence, but it was in anticipation of the need for the Charter that I did so. In 1982, the Charter simply gave us some legal authority to act.”⁵⁶⁴ In 1995 Watson cited the WCN for the first time, using its authority to chase Spanish and Cuban trawlers off the Grand Banks of Newfoundland.⁵⁶⁵ Watson was arrested and charged with mischief, but was later acquitted ‘by reason of colour of right,’ “an honest belief in a state of facts (or law...) which, if it existed, would be a legal justification or excuse.”⁵⁶⁶ Watson cites this case as establishing a precedent for the WCN thus justifying SSCS intervention.

The SSCS has also sought to bolster legal justifications for its actions. In 2008 the SSCS requested an arrest warrant from the Australian government to serve to Japanese whalers, but the request was turned down.⁵⁶⁷ In a subsequent press release, the SSCS declared that it was enforcing the January 15, 2008 ruling of the Australian Federal Court, the final result of the HSI case. The press release went on to enumerate all of the international and Australian laws which the Japanese whaling program was in breach of, and ended with Watson granting the SSCS a

⁵⁶² UN World Charter for Nature 1982, A/Res 37/7.

⁵⁶³ *Ibid.*; and see SSCS, “International Laws and Charters,” available at <http://www.seashepherd.org/who-we-are/laws-and-charters.html> (accessed May 8, 2011); and see Watson quoted by Essemli with Watson 2013:108; Roeschke 2009:99-100; Watson quoted by Cameron 2009: 4-5; Watson 2002:343.

⁵⁶⁴ Watson 1998.

⁵⁶⁵ *Ibid.*; Watson 1994:253; SSCS, “Mandate,” available at <http://www.seashepherd.org/who-we-are/mandate.html> (accessed July 10, 2013).

⁵⁶⁶ *R. v. Penahue* (1991), 90 Nfld. & P.E.I.R. 207 (Nfld/ Prov. Ct.).

⁵⁶⁷ SSCS, “Sea Shepherd Requests a Warrant from the Australian Government,” February 18, 2008, available at <http://www.seashepherd.org/news-and-media/2008/02/18/sea-shepherd-requests-a-warrant-from-the-australian-government-561> (accessed July 22, 2013).

warrant “for action to restrain Japanese whaling activities in accordance with the January 15, 2008 ruling of the Australian Federal Court” by the authority of the WCN.⁵⁶⁸

Most of the current academic literature on the SSCS explores the legitimacy of its claims to enforce international law. Roeschke is one of the few who argues that the SSCS does have legal authority through the WCN, and should be permitted to enforce international conservation law given a lack of political will and inherent costs, although he recommends that the SSCS use less ‘controversial means.’⁵⁶⁹ However, most scholars argue that SSCS claims to legitimacy under the WCN are exaggerated. Caprari notes that the WCN is a UN resolution “and is therefore non-binding on any party to it because it does not constitute a formal source of international law.”⁵⁷⁰ Anton argues that even if the WCN did represent “legal normativity of the hardest variety, nothing in it confers authority on non-state actors to enforce international law in the self-help, physical way asserted by Watson and Sea Shepherd,”⁵⁷¹ and that any efforts to support the objectives and requirements of the Charter be “subject to lawful avenues of action.”⁵⁷² Anton suggests that efforts to conduct citizen arrests are far more rooted in the domestic rather than the international legal tradition, and that Section 3Z of the *Crimes Act*, allows for citizen arrest under Australian law.⁵⁷³ Anton does go on to note that this may be problematic under international law as “no state (much less Sea Shepherd) has the power to seize and arrest Japanese Whalers on the high seas in the Southern Ocean.”⁵⁷⁴ While the literature suggests that the WCN, or any other international law, is not a license for vigilantism,⁵⁷⁵ the fact that the SSCS can claim to draw a mandate from this Charter appears to provide the organization with several benefits; the technical legal legitimacy of this claim does not appear to matter.

⁵⁶⁸ SSCS, “A Warrant to Intervene: Sea Shepherd Intends to Enforce the Australian Federal Court Order,” February 21, 2008, available at <http://www.seashepherd.org/news-and-media/2008/02/21/a-warrant-to-intervene-sea-shepherd-intends-to-enforce-the-australian-federal-court-order-559> (accessed July 22, 2013).

⁵⁶⁹ Roeschke 2009.

⁵⁷⁰ Caprari 2010:1510; and see Moffa 2012:211; Khatchadourian 2007.

⁵⁷¹ Anton 2010a:6.

⁵⁷² *Ibid.*; Caprari 2010:1510; Jabour and Iliff 2009:277; Khatchadourian 2007.

⁵⁷³ Crimes Act (Cth) 1914, 3Z(1); Anton 2010:8a.

⁵⁷⁴ Anton 2010a:5.

⁵⁷⁵ *Ibid.*, p.19.

5.3.1.2 - Use of Legal Language

In addition to justifying its overall approach through the WCN, the SSCS also defines individual actions and operations as enforcement actions, by highlighting the illegality of its target's actions, pointing to violations of specific laws. As Vons, director of SSCS Netherlands notes: "We are an international law enforcement and anti-poaching organization and we reinforce this role through the use of legal language and by targeting poaching and other illegal activity."⁵⁷⁶ Information released by the SSCS refers to the JARPA as violating international conservation law (WCN, CITES, ATS, SOWS, ICRW) and Australian domestic law (EPBC, AWS).⁵⁷⁷ For example Watson stated the following with regards to the campaign:

The Japanese are targeting endangered species in an established whale sanctuary in Antarctica, in violation of the regulations of the IWC, in violation of the *Antarctic Treaty*, in violation of the CITES...in violation of Australian law. In fact, Australia has ruled that taking whales in the Australian-Antarctic territory cannot take place and they have warned Japan to stay out of there. And then when Japan continued, they cited them in contempt of a court order, so they're actually in violation of an Australian Federal Court order. So they're pretty blatantly criminals.⁵⁷⁸

This statement is typical of SSCS discourse. Prior to the beginning of 'Operation No Compromise', tours of the *Bob Barker* were made available to the general public, and visitors were shown a video about the SSCS, which emphasized the SSCS's WCN mandate and pointed out some of the legal violations of JARPA, portraying SSCS actions as those of police officers targeting criminals.⁵⁷⁹

SSCS discourse is filled with language and information which endeavours to frame the actions of the Japanese as illegal and SSCS actions as legal enforcement. It should be noted that as the entire operation was filmed as part of *Whale Wars*, all of the discourse of crew members represented potential content for the program, and therefore information to be disseminated to the public. Crew members, and particularly officers, often injected legal terminology into their discourse and referred to the Japanese as violating the law. For example, during a briefing, Hammarstedt advised that when throwing, to "aim at illegal property being used to commit

⁵⁷⁶ Vons, Interview, May 7, 2013.

⁵⁷⁷ Brown 2012:156; Roeschke 2009:120, fn. 147; and see note *infra*.

⁵⁷⁸ Field Journal, Watson speech at operation launch and fundraiser, November 28, 2010; Watson quoted in Cameron 2009: 5.

⁵⁷⁹ Field Journal, information video about SSCS, November 27, 2010.

illegal acts.”⁵⁸⁰ Such was the ubiquitous use of this type of language, that Chris Graves, member of the Animal Planet film crew on board the *Bob Barker*, declared that she “wishes he [Hammarstedt] wouldn’t say ‘illegal whaling’ every five minutes,” as *Animal Planet* would likely be unable to air clips containing such language for legal purposes (see also Appendix 4).⁵⁸¹

Officers were particularly aware of the power of language and labelling in supporting the SSCS’s enforcement message. Prop foulers were designated as ‘safety lines’⁵⁸² or ‘defensive lines,’⁵⁸³ ‘paintball guns’ as ‘paintball markers,’⁵⁸⁴ ‘butyric acid’ as ‘stink bombs,’ ‘research’ as ‘criminal,’ and ‘harvesting’ as ‘killing’ or ‘poaching.’⁵⁸⁵ A salient example this type of labelling can be seen in the naming of prop foulers. Over the course of the operation, the deck crew manufactured numerous prop foulers, which were named after crew members, or given names reflecting their design, such as ‘Anemone’ or ‘Turtle Grass.’ Hammarstedt commented that the prop fouler dubbed ‘The Tentacles of Death,’ “should have been called ‘Tentacles of Enforcement.’”⁵⁸⁶ The SSCS also incorporated information supporting its ‘enforcement’ frame through the manner in which it communicated with targets. When communicating with other vessels, the SSCS referred to its own vessels as ‘marine patrol ships.’⁵⁸⁷ Targets were accused of breaking the law, and often cited the laws that they were seen as violating.⁵⁸⁸ Looking at SSCS information politics, it is clear that the organization concentrates its use of information towards framing itself as having a mandate to enforce international law, and in portraying its targets as being in violation of the law. While the later frame may be relatively common amongst INGO/TAGs, the emphasis on justifying vigilante enforcement of laws is much less common.

⁵⁸⁰ *Ibid*, Crew ‘Rules of Engagement Briefing,’ Hammarstedt, December 28, 2010 and December 20, 2010; and see Burke, February 14, 2011.

⁵⁸¹ *Ibid*, Graves, March 5, 2011.

⁵⁸² *Ibid*, Cornelissen, February 4, 2011.

⁵⁸³ *Ibid*, Hammarstedt, February 27, 2011.

⁵⁸⁴ *Ibid*, December 18, 2010.

⁵⁸⁵ *Ibid*, February 27, 2011.

⁵⁸⁶ *Ibid*, February 6, 2011.

⁵⁸⁷ See for example Field Journal, communications with unknown fishing vessel, December 22, 2010.

⁵⁸⁸ *Ibid*, for example regarding the *Sun Laurel* and engaging in refueling operations below 60°S, Cornelissen, January 13, 2011; Cornelissen, *Whale Wars*, Season 5:6, at 15:56 (aired July 6, 2012); Hammarstedt, in *Whale Wars*, Season 5:8 at 45:57 (aired July 20, 2012), and Season 4:10, at 10:16 (aired August 12, 2011).

5.3.2 - Symbolic Politics

A powerful tool incorporated into the image events of INGOs/TAGs is David and Goliath imagery or manufactured vulnerability, often created when activists serve as human shields. The intent of ‘human shield’ tactics “is to induce or impel the target ship to halt or modify her activities, not out of fear for herself, but out of that of harming the protesters.”⁵⁸⁹ Greenpeace is particularly well known for incorporating ‘human shield’ tactics into its actions, generating images of activists dangling from precarious perches or being hosed down.⁵⁹⁰ Land-based radical environmental activists will often take advantage of the added moral resonance evoked through manufactured vulnerability, for example, through the use of tripods or tree-sits.⁵⁹¹

It is undeniable that SSCS actions produce dramatic images and thereby attract media attention and that the SSCS employs symbolic politics, however SSCS image events do not rely on the symbols typical of INGOs/TAGs. The SSCS is not playing the role of the morally justified and motivated protester, bearing witness and putting its activists’ safety in the hands of the whalers: it is aggressively intervening against the whalers. The images produced by SSCS actions accentuate the organization and its aggressiveness, which is further reinforced through the use of pirate symbolism, yet at the same time, the SSCS also goes to considerable lengths to present itself as a law enforcement organization. It has already been noted that the organization injects its rhetoric with legal content, but the SSCS also employs legal imagery and incorporates legal practices, such as the gathering of evidence, into its actions. Rather than ‘David and Goliath,’ the SSCS injects its actions with a ‘cops and robbers’ frame.

Supporting its image as a conservation organization, the SSCS also makes efforts to avoid having its actions appear environmentally harmful. The SSCS balances its ‘aggressive pirate image’ with its ‘law enforcement image’ through the use of proportionality. The organization carefully avoids unnecessarily violating the law or appearing excessively violent, going so far as to avoid tactics which would otherwise be effective at stopping the whalers, but which might appear disproportionate. The overall legality of SSCS actions remains in dispute,

⁵⁸⁹ Plant 2002:97-98.

⁵⁹⁰ *Ibid.*

⁵⁹¹ Doherty 2000:69.

however the fact that any potential legal violations on part of the SSCS appear less significant than those of its target, further reinforce the SSCS's image as a law enforcement organization.

An additional feature of SSCS's overall strategy is the role played by symbolic politics. Unlike the actions of organizations such as Greenpeace, it does not appear as though the primary purpose of SSCS actions is the creation of image events. The SSCS engages in actions for which it does not seek publicity, with such actions not always benefiting from publicity. The media strategy of the SSCS is much less oriented around attracting the media given that its actions attract attention on their own, and because the organization has captured media attention in the form of its own ongoing television program, *Whale Wars*.

5.3.2.1 - Use of Legal Imagery

The SSCS uses a range of legal symbols in order to appear as an enforcement organization. Cornelissen noted that when the SSCS flies the UN flag, it is not only doing so to symbolically represent global opposition to whaling, but to represent the WCN – the SSCS's mandate.⁵⁹² Following 'Operation No Compromise,' the SSCS vessels were re-painted with naval camouflage – in varying shades of gray, blue and white. Similar to naval vessels, each vessel was painted with a bow number.⁵⁹³ Long-serving crew members recounted incidents where SSCS vessels and personnel had been mistaken as belonging to law enforcement.⁵⁹⁴ In a form of symbolic politics of their own, the Japanese have written 'RESEARCH' (in English) on the sides of its vessels, and the *YM#3* and the *Nisshin Maru* both sported banners which read 'Animal Planet Promotes Ecoterrorism.'⁵⁹⁵ In response the SSCS recently painted 'ANTI-POACHING' and its Japanese translation 密漁反対, on the side of the *Sam Simon*, a former Japanese weather research ship acquired in 2012.⁵⁹⁶ These observations lend support to the findings that the SSCS supports its claims to enforce international law by employing legal imagery.

⁵⁹² Field Journal, Cornelissen, March 3, 2011.

⁵⁹³ Although these were not for identification as is the case with naval vessels. The *Bob Barker* and *Steve Irwin* were painted with the number '77' standing for the year the SSCS was ostensibly founded.

⁵⁹⁴ Field Journal, incident off the coast of Somalia, Interview with Cornelissen, May 10, 2013; anecdote about the original Scottish Fisheries Protection Agency markings on the *Steve Irwin*, Hammarstedt, January 2, 2011.

⁵⁹⁵ For *YM#3* see Field Journal, January 1, 2011; for *Nisshin Maru* see February 10, 2011.

⁵⁹⁶ From photographs and updates on the *Sam Simone* Facebook page, August 17, 2013.

Care was taken to ensure that crew members looked and acted like enforcement officials. During a briefing, Hammarstedt advised crew members to behave professionally during actions, and advised RIB crews to avoid shouting profanity, ‘yipee ki yay,’ or a combination of the two.⁵⁹⁷ Crew members were required to wear uniforms at all times. The ‘Crew Welcome: Guidelines and Policies’ specified that “You are required to be neat and wear the SSCS ‘uniform’ which means wearing our Sea Shepherd t-shirts, sweatshirts, and hats (if you wear hats) *only*.”⁵⁹⁸ This ‘uniform,’ though vague (it included any SSCS clothing and gear), was strictly enforced. Early on in the campaign I wore a non-SSCS shirt, and was quickly asked to change.⁵⁹⁹ Potts and Hammarstedt explained the SSCS ‘grew up a lot’ between season one and two of *Whale Wars*, with the first seasons plagued by accidents and mishaps. As a result, a more concerted effort was made to make the crew look and behave more professionally, as would be expected of law enforcement officers.⁶⁰⁰ SSCS officers also wear uniforms, and Watson is well known for appearing in public wearing a formal naval uniform with gold captain’s braids and appropriate hat.⁶⁰¹

5.3.2.2 - *Gathering Evidence and ‘Legal Practices’*

The SSCS also incorporates legal practices into its actions, further reinforcing the organization’s law enforcement image. Crew members, when possible, gather evidence of a target’s violations of laws and regulations. What differentiates SSCS’s evidence gathering from that of INGOs/TAGs engaged in conventional accountability politics is that the SSCS does not use the evidence it gathers to shame targets into compliance, or as part of a broader lobbying strategy. SSCS evidence gathering serves to establish whether the SSCS can intervene against a target, building a case to justify actions against that target. Similar to conventional INGO/TAG monitoring strategies the SSCS does provide its evidence to IOs and states, where the SSCS differs, it does not wait for IOs and states to act on this information. For example while searching

⁵⁹⁷ Field Journal, ‘rule of engagement’ briefing, Hammarstedt, December 28, 2010.

⁵⁹⁸ Emphasis original. SSCS, “Crew Welcome: Guidelines and Policies,” p. 5.

⁵⁹⁹ Field Journal, December 4, 2010.

⁶⁰⁰ *Ibid*, Hammarstedt, November 24 and 30, 2010; and Potts, March 4, 2011, and December 17, 2010.

⁶⁰¹ Field Journal, wearing ‘anti-poaching officer’ badge through customs anecdote, Hammarstedt, January 2, 2011; and see Watson 1994:160.

for the *Nisshin Maru*, a lookout spotted pink objects floating in the sea. A RIB was launched and a chunk, which was identified as whale blubber, was recovered.⁶⁰² The blubber was stored in the ship's freezer.⁶⁰³ Cornelissen informed me that the act of disposing of whale offal at sea violated a range of environmental protocols of the AT, as well as the International Convention for the Prevention of Pollution from Ships (MARPOL), which prohibits dumping food waste of a certain size, with the exception of fish, thereby putting the Japanese in violation of these treaties.⁶⁰⁴

A second incident stands out where the SSCS first verified that the target of its actions was in violation of the law, prior to acting. On December 22, 2010, the *Bob Barker* spotted several buoys, indicating a fishing operation. The first buoy was found at 65°50'S and 146°40'E, placing it within the Convention Area of CCAMLR, specifically Statistical Area 58.4.1. CCAMLR reports that this area has "high levels of IUU fishing, in 2005/06, 2006/07 and 2009/10 resulted in the total removals being well in excess of the catch limits."⁶⁰⁵ Vessels engaged in fishing in this area must be specifically licensed and Cornelissen was aware of this fact.⁶⁰⁶ A vessel was spotted on the horizon and hailed: "Unknown vessel, this is the Antarctic patrol vessel the *Bob Barker*, please identify yourself."⁶⁰⁷ The vessel failed to identify itself and fled. RIBs were launched to inspect the buoys for radio beacons or identifying marks, which would have been present in legally set lines. No such evidence was found, and the lines were determined to be those of poachers, fishing for threatened Patagonian toothfish. The crew set about recovering the lines and, working through the night, recovered over 3kms of line, and sunk two remaining nets. CCAMLR specifies that the Statistical Area is only open to an 'exploratory long-line fishery,' and once recovered it was found that the lines further violated CCAMLR, because they were gill nets.⁶⁰⁸ Cornelissen noted that this was not the first time the SSCS had confiscated gear used in apparent poaching operations, and that several confiscations were not publicized.⁶⁰⁹

⁶⁰² Field Journal, February 8 and 9, 2011.

⁶⁰³ See *Ibid*, Cornelissen, January 17, 2011; and December 29, 2010.

⁶⁰⁴ *Ibid*; 12 ILM 1319 (1973); TIAS No. 10,561; 34 UST 3407; 1340 UNTS 184.

⁶⁰⁵ CCAMLR, "Fishery Report: Exploratory Fishery for *Dissostichus* Spp. In Division 58.4.1," TOT 58.4.1. p. 3.

⁶⁰⁶ *Ibid*, p. 2.

⁶⁰⁷ Field Journal, Alex Cornelissen, December 22, 2010.

⁶⁰⁸ CCAMLR, CM 166/XVII (1999/1999).

⁶⁰⁹ Field Journal, example of the release of poached lobsters in South Africa in 2006, Cornelissen, February 26, 2011; and see example in SSCS, "The *Bob Barker* Confiscates Poaching Gear from the Southern Ocean's Waters," December 23, 2010, available at <http://www.seashepherd.org/news-and-media/news-101223-1.html> (accessed April 16, 2011).

5.3.2.3 - Pirate Symbolism

In apparent contradiction to its efforts to portray itself as a law enforcement organization through the use of legal language and symbolism, the SSCS deploys pirate symbolism and iconography. The SSCS has its own Jolly Roger, a skull over a crossed trident and shepherd's crook with marine mammal embellishments.⁶¹⁰ During 'Operation No Compromise' RIBs were decorated with 'shark mouth' nose art (popular with World War II airplanes) and SSCS' vessel were painted black and decorated with 'kill flags' of the vessels 'sunk' by the SSCS.⁶¹¹ The rails of the *Bob Barker* were covered in prominent yellow anti-boarding spikes which Burke described as 'passive aggressive spikes,' noting that "they only work when people see them and not when they are tested."⁶¹² In other words, the spikes are more symbolic, conveying the SSCS's 'hardcore look' over functionality. These efforts all contribute to the SSCS's 'pirate brand.'⁶¹³ Watson attempts to explain the apparent contradiction between simultaneously employing law enforcement and pirate symbolism by describing the SSCS as "pirates of compassion in pursuit of pirates of profit."⁶¹⁴ Watson argues that "[p]iracy was finally shut down in the Spanish Main by the pirate Sir Henry Morgan. It took a pirate to end piracy."⁶¹⁵ In essence, Watson is attempting to portray the SSCS as privateers, with a letter of marque in the form of the WCN.

The use of this language and symbolism does not suggest that the SSCS is admitting to actually committing acts of piracy, which, as explored below, would be very problematic. Instead, the SSCS is attempting to draw on the positive cultural connotations of pirates, such as the pirate as a romantic renegade – Robin Hood, Captain Blood, or Captain Jack Sparrow. It is these charming and heroic icons which often come to the mind of the general public when pirate symbolism is used, not the realities of piracy off the coast of Somalia or in the Straits of

⁶¹⁰ Field Journal, a design by Vons, December 15, 2010 and February 11, 2011.

⁶¹¹ More accurately representing the vessels the SSCS claims responsibility for taking out of operation, as not all the flags and names of vessels listed in the kill flags were in fact sunk.

⁶¹² Field Journal, Burke, March 3, 2011.

⁶¹³ *Ibid*, Andrea Gordon, ship's manager on the *Bob Barker*, February 4, 2011.

⁶¹⁴ Field Journal, Zin, cook on the *Bob Barker*, quoting Watson, December 17, 2010; Watson, November 28, 2010; and see Stuart et al. 2013:8; Watson 1998.

⁶¹⁵ Field Journal, Watson, November 28, 2010 and March 6, 2011; and see Paul Watson, "I'm Proud to be a Pirate," *Guardian*, January 23, 2008, available at <http://www.guardian.co.uk/commentisfree/2008/jan/23/japan.australia> (accessed July 20, 2013).

Malacca.⁶¹⁶ The use of pirate symbolism ultimately serves as short hand, to describe the organization as aggressive and confrontational yet ultimately on the side of good.

Pirate symbolism also helps the SSCS differentiate itself from other organizations and appeal to potential supporters. Stuart et al. suggest that SSCS members use labels like pirate to describe themselves as ‘hardcore’ and to distinguish the SSCS from other, less ‘hardcore’ groups.⁶¹⁷ Using pirate symbolism appeals to supporters, because pirates are cool. As Watson summarizes, “it’s all theatrics. Kids love the pirate image.”⁶¹⁸ This allows the SSCS to attract supporters from demographics which may otherwise be uninterested in conservation issues.

5.3.2.4 - Aggressive Action and Reputation

The SSCS’s use of pirate imagery is not exclusively ‘theatrics’ as Watson suggests, it is also a means by which the SSCS can quickly convey the message that it is “the most aggressive, determined, and effective marine wildlife conservation organization.”⁶¹⁹ Pirate symbolism is part of the broader reputation that the SSCS has for being aggressive – an organization to be taken seriously. This image serves several strategic purposes. It allows the SSCS to win victories on reputation alone. Throughout its history, the SSCS has achieved outcomes by maintaining a high threat capacity, for having a “reputation for not backing down.”⁶²⁰ Nagtzaam and Lentini note that the SSCS’s “preferred way of negotiation is by intimidation,”⁶²¹ and targets know from the organization’s reputation that the SSCS will not, as the name of the operation suggests, compromise. The message conveyed by SSCS reputation is that targets can expect confrontational action which will likely interfere with their operations, and those wishing to avoid such interference should stop their actions.⁶²²

The SSCS also incorporates a variety of elements designed to convey its high threat capacity into its operations. Campaign names and vessel names are chosen to mock, antagonise or intimidate opponents. The operations Musashi (2008-2009) and Divine Wind (2011-2012)

⁶¹⁶ See for example Burnett 2003.

⁶¹⁷ Stuart et al. 2013:10.

⁶¹⁸ Besel and Besel 2010:164, quoting Watson; and see Field Journal, Watson, November 28, 2010.

⁶¹⁹ Bold heading on SSCS leaflet (date unknown).

⁶²⁰ Field Journal, Hammarstedt, February 23, 2011.

⁶²¹ Nagtzaam and Lentini 2008:124, citing Scarce 2006:104.

⁶²² See the *Astrid* incident *supra* note 529; Darby 2007:122-123; Watson 1993c:178.

were clearly selected for their references to Japanese culture, Miyamoto Musashi being a famous strategist, tactician and undefeated *rōnin*, and a reference to the famous tsunami, respectively. Operation names such as ‘No Compromise’ (2010-2011), ‘Zero Tolerance’ (2012-2013), and the upcoming ‘Relentless’ (2013-2014), similarly seek to convey specific connotations. Watson explains that the name *Gojira* “is a form of psychological warfare. It’s an intimidating looking vessel and also we gave it the name *Gojira* which means Godzilla which is much more relevant in than outside Japan.”⁶²³

The SSCS clearly goes to lengths to portray itself as confrontational and aggressive. Highlighting aggressiveness is not typically a tool of INGOs/TAGs, but it is a clear component of SSCS, providing the organization with tactical and strategic advantages. Most INGOs/TAGs use norms as the primary vocabulary; they make normative claims, advocate on principled issues, exert moral leverage, and attempt to introduce and propagate norms in TCS.⁶²⁴ The SSCS is not engaging in CD, where activists demonstrate the righteousness of their cause through the righteousness of their actions. As Burke pointed out, with the SSCS approach, you “don’t forfeit the moral high ground, because you don’t seek it.”⁶²⁵ The SSCS does not frame its actions as challenging and violating unjust laws, but rather as enforcing existing ones, and doing so aggressively.

5.3.2.5 - Legality of SSCS Actions

The legality of SSCS actions is hotly contested. For an organization which claims to enforce the law, the SSCS has been branded as ‘pirates’ and ‘terrorists’ by states, other NSAs, and scholars alike.⁶²⁶ Being branded as a pirate is highly problematic, piracy *jure gentium* is *jus cogens* – a norm which is recognized as being fundamental to the maintenance of international order, and under international law states have universal jurisdiction to punish pirates, as *pirata*

⁶²³ Field Journal, Watson, November 28, 2010; see also Watson in *Whale Wars*, Season 4:1, at 6:47 (aired June 3, 2011).

⁶²⁴ See for example Sasser et al. 2006:5; Sikkink 2002; Thomas 2002:72.

⁶²⁵ Field Journal, Burke, February 14, 2011.

⁶²⁶ Moffa 2012:210; Caprari 2010:1507; Hoek 2010; Plant 1983:139.

est hostis generis humani.⁶²⁷ Generally speaking, piracy is defined as “any illegal acts of violence or detention, or any act of depredation, committed *for private ends* by the crew or the passengers of a private ship or a private aircraft” occurring outside the territorial jurisdiction of any state.⁶²⁸ The general consensus is that SSCS actions do not constitute piratical acts, as they lack the intent to pursue private ends (*animo furandi*).⁶²⁹ Appearing to confirm this is the fact that when Pete Bethune was arrested for boarding one of the Japanese vessels in 2010 (see Bethune-*Ady Gil* Incident, Chapter 5.3.3.3) he was not charged with piracy.⁶³⁰ A recent ruling by the 9th District Court in the US appears to challenge the consensus. In 2012 Japan sought an injunction against the SSCS in the US. The initial request was denied, but later granted upon appeal, placing an injunction on SSCS USA and Watson.⁶³¹ The SSCS quickly reorganized itself: Watson stepped down as head of the organization, replaced by noted Australian Green’s politician Bob Brown, and the 2012-2013 campaign proceeded as planned with the coordinating body being SSCS Australia rather than SSCS USA.⁶³² Watson remains highly influential within the SSCS.

This is not the first time that the Japanese have sought to ‘undermine the SSCS’s legal legitimacy’ and actions through legal means.⁶³³ Japan has made numerous attempts by way of international warrants through the International Criminal Police Organization (INTERPOL) to have prominent SSCS members arrested.⁶³⁴ This approach was largely unsuccessful until May 2012 when Watson was arrested in Germany for extradition to Costa Rica, to answer for alleged attempted murder in a ramming incident which occurred during anti-shark fin operations in

⁶²⁷ ‘An enemy of mankind or at war with the whole world.’ UNCLOS, 13 UST 2312; 450 UNTS 1, Article 105; and see *inter alia* Greene 2008:691, 685; Garmon 2002-2003:259-260; Plant 2002:90.

⁶²⁸ Emphasis added. UNCLOS, Article 101(a); Garmon 2002-2003:261.

⁶²⁹ Caprari 2010:1512, 1512; Hoek 2010:187; Jabour and Iliff 2009:281-282; Roeschke 2009:129; Nagtzaam and Lentini 2008:114.

⁶³⁰ Ryan 2010:10.

⁶³¹ Nucci 2013:1051 and 1054-1055; see also Guilfoyle 2013; United States Courts for the Ninth Circuit, “Institute of Cetacean Research v. Sea Shepherd Conservation Society,” 12-35266, available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000655 (accessed July 14, 2013); Richard Read, “Sea Shepherd Whale Activists Called Pirates, Lose Ruling by 9th Circuit Judges,” *The Oregonian*, February 26, 2013, available at http://www.oregonlive.com/business/index.ssf/2013/02/sea_shepherd_whale_activists_c.html (accessed July 14, 2013).

⁶³² See Martin Dunphy, “Sea Shepherd’s Paul Watson Steps Down as Captain but Still Sails Against Japanese Whalers,” *Vancouver Straight*, January 10, 2013, available at <http://www.straight.com/news/342241/sea-shepherds-paul-watson-steps-down-captain-still-sails-against-japanese-whalers> (accessed July 14, 2013).

⁶³³ Mills and Ernst 2012:212.

⁶³⁴ Ryan 2010:3; and see Michael Destries, “Interpol Issues Red Notice for Sea Shepherd’s Paul Watsons,” *Ecorazzi*, August 8, 2012, available at <http://www.ecorazzi.com/2012/08/08/interpol-issues-red-notice-for-sea-shepherds-paul-watson/> (accessed July 14, 2013).

2002.⁶³⁵ Pending a decision on his extradition, Watson skipped bail, and joined up with the SSCS fleet in Australia.⁶³⁶

The SSCS has also been accused of committing (eco)terrorism.⁶³⁷ There are no specific international laws on ecoterrorism, especially at sea; the nearest approximation is the SUA, which was adopted in 1988 in order to address forms of violence at sea committed for non-private ends, omitted from UNCLOS.⁶³⁸ Caprari argues that SSCS actions violate SUA, specifically Article 3(1)(c), by attempting to cause damage to a ship “which is likely to endanger the safe navigation of that ship,” through such actions as prop-fouling.⁶³⁹ States party to SUA must investigate allegations of violations of the Convention, but there is no requirement that they “complete prosecution and punish the individual appropriately.”⁶⁴⁰ Japan has repeatedly requested that Australia investigate SSCS actions as violations of SUA, which the Australian government does, though not wholeheartedly. The AFP search SSCS ships upon their arrival in port following campaigns, but no prosecutions have arisen from these investigations.⁶⁴¹ Jabour and Iliff argue that SSCS actions do not meet the definition of maritime terrorism under Australian law, which states that “any action which can be deemed a ‘protest’ and is not intended to cause serious harm is not a terrorist act.”⁶⁴² One thing which is clear is that in their manoeuvres, which often lead to collisions or to bring vessels dangerously close, both the SSCS and the ICR/Kyodo are likely guilty of violating the International Regulations for the Prevention of Collisions at Sea 1972 (IRPCS/COLREGs).⁶⁴³ Brown concludes that the SSCS actions likely

⁶³⁵ For initial incident see Rod Stewart, *Sharkwater*, Sharkwater Productions and Diatribe Pictures/Alliance Films, 2006; see also SSCS, “Captain Paul Watson Arrested in Frankfurt, Germany on Warrant Issued by Costa Rica,” May 13, 2012, available at <http://www.seashepherd.org/news-and-media/2012/05/13/captain-paul-watson-arrested-in-frankfurt-germany-on-warrant-issued-by-costa-rica-1374> (accessed July 14, 2013).

⁶³⁶ Siobhan Dowling, “Paul Watson Skips Bail in Germany,” July 26, 2012, available at <http://www.guardian.co.uk/environment/2012/jul/26/paul-watson-skips-bail-germany> (accessed July 14, 2013).

⁶³⁷ ICR, “Illegal Harassment and Terrorism Against ICR Research,” available at <http://www.icrwhale.org/gpandsea.html> (accessed September 22, 2013); Japanese presentation on “Resolution on Safety at Sea,” IWC meeting Jersey, Field Journal, July 12, 2011; and see IWC/63/17; and see Caprari 2010:1519; Hoek 2010:162.

⁶³⁸ Caprari 2010:1516.

⁶³⁹ *Ibid.*, p.1517; SUA, 1678 UNTS 221:27 ILM 668 (1988), Art. 3(1)(c); Ryan 2009:139; Moffa 2012:210.

⁶⁴⁰ Caprari 2010:1518; Ryan 2010:3.

⁶⁴¹ See warrant issued by AFP to SSCS vessels, *supra* note 556; Field Journal, March 6, 2011; Ryan 2010:3.

⁶⁴² Criminal Code Act 1995 (Cth), Part 5.3 Terrorism, 100.1 Definitions, (1) terrorism act; cited by Jabour and Iliff 2009:281-282.

⁶⁴³ Brown 2012:155, 158; Hoek 2010; Caprari 2010:1522; Kanehara 2009:8; Plant 2002:88.

violate Australian and New Zealand navigation laws, as well as criminal laws (common assault and intentional damage) under the New Zealand Crimes Act.⁶⁴⁴

5.3.2.6 - Proportionality and Adhering to the Law

The overall legality of SSCS actions remains in dispute. SSCS actions are at times aggressive, and some may violate shipping regulations, but the organization goes to considerable lengths to avoid unnecessarily violating laws and regulations, to eschew tactics which may appear as illegal, violent or excessive, and to avoid harming the environment. On several occasions over the course of ‘Operation No Compromise,’ the SSCS eschewed tactics which may have otherwise been effective, but which would have appeared disproportionate, and thereby harmful to the SSCS’s carefully constructed image as an enforcement organization.

The SSCS has moderated its tactics since its earlier days. The organization has declared that it no longer sinks ships and had disavowed the use of ramming.⁶⁴⁵ The ‘kill flags’ on the *Bob Barker* serve to illustrate this point; adjacent to the flags and ship names of the vessels under the heading of ‘sunk,’ was a second set of flags and ship names under the heading ‘rammed,’ however this has been painted over.⁶⁴⁶

During ‘Operation No Compromise’ the SSCS avoided unnecessarily violating laws. The helicopter, which would have been an effective tool for deploying projectiles around defensive netting and for other offensive tactical actions, was expressly reserved for reconnaissance and surveillance of actions. I was informed that using the helicopter for anything else would violate the law, cost the pilot his license and make the helicopter a viable target for retaliation, potentially threatening lives (see also Appendix 5).⁶⁴⁷ The *Bob Barker* is a Dutch registered ship, and following Japanese complaints as a result of incidents on previous campaigns, the Dutch government had instructed the SSCS not to throw butyric acid from any Dutch registered ships

⁶⁴⁴ Crimes Act 1961 (NZ), cited by Brown 2012.

⁶⁴⁵ Field Journal, Cornelissen noted that the SSCS stopped sinking vessels in 1996 as a means of developing more favourable relations with legitimate fishermen, January 17, 2011; and see Burke, February 14, 2011; Hammarstedt, February 23, 2011.

⁶⁴⁶ Field Journal Michael May, quartermaster on the *Bob Barker*, January 30, 2011; and see December 29, 2010.

⁶⁴⁷ See for example *ibid*, December 16, 2010.

and to abide by the rules of good seamanship.⁶⁴⁸ Cornelissen, a Dutch citizen, was particularly concerned with adhering to this request, as throwing things from the *Bob Barker* would “receive lots of criticism,” and potentially jeopardise the vessel’s flag. As a result, deck crews on board the *Bob Barker* were briefed to only throw butyric acid on explicit orders.⁶⁴⁹ As a result, no butyric acid was thrown from the *Bob Barker* during the entire operation (see also Appendix 6).

The SSCS was careful to ensure that the regulations it may have broken were proportionately less serious than those which it accused its targets of violating. When it was dark, even while being pursued by a harpoon vessel, the *Bob Barker*’s navigation lights were on. Hammarstedt noted that this was “so they can’t claim we’ve broken international regulations for safe navigation.”⁶⁵⁰ Navigation lights were only turned off when the *Bob Barker* attempted to lose its tail in a night operation and prior to encountering the fleet.⁶⁵¹ The SSCS was very serious when it came to upholding its obligation to respond to a Mayday call. On February 4, 2011 the SSCS succeeded in fouling the propeller of the *YM#3* during an engagement. The disabled ship released a distress call and the SSCS RIBs immediately ceased engagement with the vessel. In a press release following the incident, the ICR stated that

continuing [to] attack even after the YS3[*YM#3*] had sent a Mayday signal not only infringes international law regarding the orderly navigation on the seas but it is a clear outrage against humanity, that further demonstrates the need to put an end to SSCS’s criminal activities once and for all.⁶⁵²

The SSCS quickly released video footage of the crew of the *Gojira* responding to the call.⁶⁵³ After less than an hour the *YM#3* succeeded in freeing its prop, only to have it fouled a few hours later. This time the harpoon vessel was disabled for three days, during which time the *Gojira*

⁶⁴⁸ *Ibid*, Vons, December 25, 2010.

⁶⁴⁹ *Ibid*, ‘Crew Actions Briefing,’ Cornelissen, February 3, 2011; February 4 and 11, 2011; see also Burke, January 7, 2011; Vons, December 25, 2010.

⁶⁵⁰ *Ibid*, Hammarstedt, January 2, 2011, 21:50.

⁶⁵¹ See *ibid*, December 10, 2011; and January 20, 2011.

⁶⁵² ICR, “Bob Barker, Gojira activists sabotage Japanese research vessel *Yushin Maru No. 3* even after sending a Mayday signal,” February 4, 2011, available at <http://www.icrwhale.org/pdf/110204ReleaseENG.pdf> (accessed April 17, 2011).

⁶⁵³ SSCS, “Japanese Whalers Issue a False Distress Signal,” February 6, 2011, available at <http://www.seashepherd.org/news-and-media/2011/02/06/japanese-whalers-issue-a-false-distress-signal-54> (August 1, 2011).

stood by, fulfilling its obligation to offer assistance, until the Australian maritime authorities who were handling the distress call informed the vessel it could stand down.⁶⁵⁴

Gary Stokes, photographer on the *Bob Barker*, commented, “we should avoid doing things which look too aggressive and do nothing...”⁶⁵⁵ Several proposed tactics were rejected due to appearing too violent or radical, for example the suggestion that grappling hooks be used to pull down Japanese netting⁶⁵⁶ and the possibility of staging a fake boarding with a dummy (and see Appendix 7).⁶⁵⁷ The SSCS also adjusted its tactics given responses to them. A further example where officers rejected an action or tactic which appeared disproportionately violent and illegal involved the ‘Mick Jagger’ flares. On January 9, 2011, RIBs from the *Bob Barker* engaged with the *YM#2*, attempting to prevent it from tailing the *Bob Barker*. Small boat teams threw ‘Mick Jagger’ smoke flares into the defensive netting of the whaling vessel. Amongst the smoke flares, each small boat threw a hand-held phosphorus signal flare, which burn bright-red for several minutes, similarly fitted like the ‘Mick Jagger’ smokes. The ICR accused the SSCS of throwing incendiary devices and military ‘flash-bang’ grenades.⁶⁵⁸ In public Watson claimed that Japanese water hoses were more dangerous than the flares,⁶⁵⁹ however Cornelissen was very concerned, as neither he, nor any SSCS officer, had authorized the use of the flares, and noted that he would likely receive a call from the AFP as a result of the incident.⁶⁶⁰ Members of the crew, watching ICR video footage of the incident, noted that it did not look good.⁶⁶¹ The deck crew was given a serious dressing down for including the flares in the RIBs arsenals, and protocols were developed to prevent such a thing from happening in future actions.⁶⁶²

The SSCS also avoided using tactics which might have harmed people or the environment. The SSCS avoided targeting the *Sun Laurel* with prop-foulers or butyric acid, and

⁶⁵⁴ See Field Journal and Daily Action Log, February 4, 2011; *Whale Wars*, Season 4:8, at 16:20 (aired July 29, 2011).

⁶⁵⁵ Field Journal, conversation, February 1, 2011.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Ibid.*, Chad Halsted, small boat pilot and deckhand on board the *Bob Barker*, January 28, 2011.

⁶⁵⁸ ICR, “Bob Barker Activists Attack Japanese Research Vessel *Yushin Maru No. 2*,” January 9, 2011, available at <http://www.icrwhale.org/pdf/110109ReleaseENG.pdf> (accessed July 22, 2013).

⁶⁵⁹ Watson quoted in interview with 3News, “Whalers’ hoses more dangerous than flares – Watson,” January 10, 2011, available at <http://www.3news.co.nz/Whalers-hoses-more-dangerous-than-flares--Watson/tabid/1216/articleID/193785/Default.aspx> (accessed July 22, 2013).

⁶⁶⁰ Field Journal, Cornelissen, January 10, 2011.

⁶⁶¹ *Ibid.*, Sara Margaret Keltie, deckhand on the *Bob Barker*, January 10, 2011.

⁶⁶² See for example *ibid.*, the Cornelissen verifying that no flares were loaded onto RIBs prior to an action, February 1, 2011; and see Phelps Bondaroff 2011:28, fn.48.

instead chose to picket the vessel and to ‘escort it north of 60°.’⁶⁶³ Targeting a tanker with anything could be (perceived as) dangerous and as such, was avoided. As a conservation organization, the SSCS cannot appear to damage the environment through its actions. When designing new tactics – such as innovative ways by which to deploy cellulose powder or fouling props – the crew was very careful to ensure that these tactics: 1) did not run the risk of hurting a member of the whaling crew, 2) would not harm the oceans and marine wildlife, and 3) would be effective, in that order. For example, using balloons inside papier-mâché balls to deploy cellulose powder was rejected due to the detrimental effect of balloons on marine wildlife, and nets, generally seen as the most effective means of fouling a propeller, were rejected on similar grounds.⁶⁶⁴ Hammarstedt joked that SSCS tactics were “organic, fair trade, non-lethal, non-violent, non-toxic, biodegradable, [and] vegan.”⁶⁶⁵ The SSCS also maintains vegan vessels, whereby all food served on board its ships does not contain any animal products, this not only serves to bolster the organization’s environmental and animal rights credentials and placate animal rights/liberation oriented crew members, but also to deflect claims of cultural imperialism, the so called ‘you eat chicken and burgers’ arguments.⁶⁶⁶

Not all consider SSCS actions as restrained, ICR press releases regularly describe the SSCS as terrorists. Similarly SSCS actions are condemned at the IWC. At the 2011 Meeting in Jersey a ‘Safety at Sea’ resolution was unanimously passed which “condemned any actions that intentionally imperil human life, the marine environment, or property, during demonstrations, protests or confrontations on the high seas.”⁶⁶⁷ In an interview Dr. Brockington, the Secretary of the IWC, highlighted the “potential cost of human lives,” and noted that the potential for rammings to “cause very serious incidents” is one of the reasons as to why there is a high level of agreement for the condemnation of SSCS actions within the IWC.⁶⁶⁸ SSCS actions remain controversial, and it is apparent that the SSCS is conscious of the fine line that it walks, taking steps to counter claims which would challenge the legality of its actions. Maintaining an image of proportionality, while remaining aggressive, appears integral to SSCS strategy.

⁶⁶³ *Ibid.*, January 13, 2011.

⁶⁶⁴ *Ibid.*, discussions with Hammarstedt and Halsted, February 6, 2011; and Gordon, February 10, 2011.

⁶⁶⁵ Phelps Bondaroff 2011:18; Field Journal, Hammarstedt, December 22, 2010.

⁶⁶⁶ Suhre 1999-2000:321, citing Stoett 1997:113; Kalland 1993b:4.

⁶⁶⁷ IWC, Resolution 2011-2.

⁶⁶⁸ Interview with Dr. Simon Brockington, Secretary to the IWC, August 2, 2011, IWC Offices, Impington.

5.3.2.7 - SSCS and the Media

The SSCS can be described as having moved beyond simply attracting media attention to capturing it and the organization also seems to have addressed the issue of movement-media asymmetry in a novel and innovative way. Unlike most INGO/TAG media attention, the principal target of SSCS messaging is governments rather than the public. Movement-media relations are generally seen as being characterized by asymmetry, whereby “[m]ovements are generally much more dependent on media than the reverse.”⁶⁶⁹ Movements need the media to help with, as Gamson notes, mobilization (recruiting and encouraging supporters),⁶⁷⁰ validation (lending credibility, legitimacy and significance to activists’ cause),⁶⁷¹ and scope enlargement (generating sympathy for the activists’ cause amidst the broader public).⁶⁷² The media is generally much less dependent on individual movements, in so far as other movements, events or causes can generate media coverage, and as a result activists are required to develop innovative ways of attracting media attention. Having secured media attention, additional challenges include sustaining this attention, and ensuring that the media conveys desirable frames.

One of the ways in which activists can attract media attention is by changing their behavior to conform to mainstream news criteria, however by so doing, activists “run the risk that these criteria will distort their identity and goals.”⁶⁷³ In framing issues in a manner which is palatable to mainstream media, activists abandon the “broader structural and cultural sources of environmental problems” leaving them “unchallenged and implicitly reinforced.”⁶⁷⁴ Such an approach is problematic for an organization wishing to present a position which challenges dominant frames, as is the case with the SSCS. SSCS rhetoric on the whaling issue, and on environmental issues in general, is profoundly critical of the international structure and of the sources of environmental problems, levelling its blame on pervasive and systemic non-compliance. Re-framing its message to fit within dominant frames would sterilize this message considerably.

⁶⁶⁹ Gamson and Wolfsfeld 1993:116; and see Carroll and Ratner 1999:3.

⁶⁷⁰ Gitlin 2003:242.

⁶⁷¹ *Ibid.*, p. 37; and see Cracknell 1993:7; Ryan 1991:26.

⁶⁷² Gamson and Wolfsfeld 1993.

⁶⁷³ Ryan 1991:50; and see Gitlin 2003:290-291.

⁶⁷⁴ Gamson and Wolfsfeld 1993:123.

Another means by which activists have conventionally sought to attract media attention is through the creation of poignant image events –‘mind-bombs.’ Hammarstedt explained that rammings and collisions are necessarily dramatic and guarantee media exposure, noting that the high level of press censorship in Japan can be broken by ‘intense’ actions which the press must cover.⁶⁷⁵ However with these dramatic actions, activists run the risk of having their message being lost in the reporting and/or subjected to negative spin. Stories involving dramatic actions tend to focus on activists means rather than their ends.⁶⁷⁶ Stories involving confrontation also tend to be covered as crime stories. In other words “[r]evolutionaries... can achieve media standing only as deviants,”⁶⁷⁷ and radicals are portrayed as ‘illegitimate sideshows.’⁶⁷⁸

The SSCS faces the challenge of attracting media attention while controlling spin, and appears to have accomplished this through the use of the television program *Whale Wars*. This highly-rated docu-drama program has aired for five seasons on the US cable station *Animal Planet*. Each episode serves as a 45-minute infomercial for SSCS, paid for and produced by the network, airing during a slow news season for the SSCS (the Boreal summer). Multi-episode story arcs tell stories in a way which could not be captured even by the most comprehensive of news story. In a sense one can see the SSCS use of *Whale Wars* as the infiltration of fringe ideas into the mainstream.⁶⁷⁹ The popular and mainstream-oriented docu-drama format serves as a carrier for a much less conventional message.

SSCS’s actions attract news media coverage, but the organization can be confident of additional coverage months later, essentially ‘media capture’ on the part of the SSCS. The program is one of the network’s highest rated and garners considerable revenue for the network, which is strong motivation for *Animal Planet* to continue covering SSCS actions, and to do so in an at least somewhat favourable manner, in order to maintain a positive working relationship with the organization. The film crews are captive media, living on board SSCS vessels. This embeddedness further enhances the likeliness of positive coverage. Not having to worry about attracting the media and being relatively confident that its own framing will be conveyed, the SSCS does not need to moderate its methods or message. When asked the effect that the program

⁶⁷⁵ Field Journal, Hammarstedt, February 23, 2011.

⁶⁷⁶ Carroll and Ratner 1999:13; see also Cracknell 1993:16-17.

⁶⁷⁷ Gitlin 2003:286.

⁶⁷⁸ *Ibid*, p.6.

⁶⁷⁹ Field Journal, February 25, 2011.

has had on SSCS operations, most long-serving crew members described it as minimal, noting that the program resulted in more inter-ship communication done by satellite phone rather than e-mail, additional helicopter launches for aerial shots, the use of crew uniforms, and the occasional meeting of the three ships captains.⁶⁸⁰

Whale Wars benefits the SSCS not only by disseminating awareness of the organization and by raising awareness for the whaling issue, it also assists in attracting additional financial support. In 2008, the tax year prior to the premier of *Whale Wars*, the SSCS received \$3.4 million in contributions, the following year contributions reached \$9.4 million.⁶⁸¹ As is common practice with reality television programs, the subjects receive some compensation. Hammarstedt noted that the SSCS receives a ‘location fee’ from *Animal Planet*, which ostensibly covers the cost to the SSCS of housing and feeding the television crew for the entire duration of the campaign (and see Appendix 8).⁶⁸²

Crew members described how the program was beneficial to the SSCS in other ways. Hammarstedt noted that it “lets us reach segments of the populations that wouldn’t [otherwise] hear our message,” and that the program reaches people other than the readers of vegan and environmental magazines.⁶⁸³ Cornelissen quipped that “as soon as they know they are being documented, they are less likely to shoot at us,” highlighting how the presence of cameras, especially those of the ‘third party,’ provides a degree of security for activists.⁶⁸⁴ It is interesting to consider who the primary target of the SSCS message is. Hammarstedt elaborated that “dramatic footage guarantees media exposure and wakes governments up, especially Australia and New Zealand.”⁶⁸⁵ When Potts explained that SSCS actions “sets the general precedent that these issues can and should be dealt with as law enforcement, [SSCS action] sets an example of what governments should be doing,” the primary target of this message is governments.⁶⁸⁶ Though Hammarstedt admitted that SSCS actions “do set an example which resonates with

⁶⁸⁰ See for example Field Journal, November 29, 2010; Hammarstedt, November 24 and 30, 2010 and February 23, 2011; and Potts, March 4, 2011, and December 17, 2010.

⁶⁸¹ Sea Shepherd Conservation Society, “990: Return of Organization Exempt from Income Tax,” 2008 and 2009, see Charity Navigator, <http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=5784> (November 30, 2011), and Foundation Centre, <http://tfcny.fdncenter.org/990s/990search/esearch.php> (November 30, 2011).

⁶⁸² Field Journal, February 22, 2011.

⁶⁸³ *Ibid*, February 23, 2011.

⁶⁸⁴ *Ibid*, March 3, 2011.

⁶⁸⁵ *Ibid*, Hammarstedt, February 23, 2011.

⁶⁸⁶ *Ibid*, March 4, 2011.

people who then pressure their governments,” a more conventional form of advocacy, the SSCS could accomplish this without the appeal to the law. Legal framing and language appears to be principally targeted at states, bypassing the public and sending the message directly to states that “international law can’t be voluntary.”⁶⁸⁷

The confrontational nature of SSCS actions naturally attract media attention, however SSCS RIBs are not decorated with anti-whaling slogans, and as has been indicated throughout this chapter, images produced by the SSCS are not necessarily designed as ideal ‘mind bombs.’ Observations suggest that the ultimate aim of SSCS actions, unlike those of Greenpeace for example, is not image events and media attention, but rather something more direct. Hammarstedt noted, in discussing *Whale Wars* and the media, that “in one way public opinion doesn’t matter, they [the Japanese] will have to quit.”⁶⁸⁸ Here what he is referring to is the fact that SSCS actions have a direct impact on Japanese whaling, and that they have this effect regardless of the amount and nature of the media coverage they receive. This indicates that the SSCS is engaging in a form of DA, and that image politics is secondary to the campaign objectives of stopping Japanese whaling.

Throughout the campaign, actions were launched with the aim of achieving direct results over images. A salient example is the January 20th action to attach a tracking device to the *Sun Laurel*, an operation conducted entirely under the cover of darkness.⁶⁸⁹ The goal of numerous actions, as emphasized in crew briefings, was the accomplishment of direct objectives – in this instance, to delay the tailing harpoon vessel. The February 4th actions which resulted in the disabling of the *YM#3* provides another example of this practice. Prior to the action, the SSCS negotiated with the film crew to have fewer camera people onboard the RIBs in order to make room for additional activists and to thereby increase the effective deployment of prop-foulers.⁶⁹⁰ As one crew member noted, “what’s the point of lots of pictures of a failed actions versus a successful one?” Clearly images were not the priority.⁶⁹¹ Press coverage was not always seen as

⁶⁸⁷ *Ibid*, Hammarstedt, February 23, 2011.

⁶⁸⁸ *Ibid*, February 27, 2011.

⁶⁸⁹ See Daily Action Log, January 20, 2011.

⁶⁹⁰ As per an agreement between the SSCS and Animal Planet, a spot was reserved for a cameraman on each RIB. Field Journal, February 3, 2011.

⁶⁹¹ *Ibid*, January 5, 2011.

a boon to SSCS actions. Cornelissen noted that while the media is important, it draws attention to you, which makes getting away with things such as prop-fouling more difficult.⁶⁹²

5.3.3 - Leverage Politics

The SSCS certainly uses leverage politics, but its use of leverage differs considerably from conventional use of leverage by INGOs/TAGs. SSCS actions are adept at exerting direct material leverage upon Japanese whalers. The SSCS's efforts to physically stop whaling, rather than indirectly through attracting media attention or the indirect material leverage of a boycott, are a clear indication that the organization is engaged in DA. The SSCS did not emphasize the moral reasons in support of its actions, but goes to lengths to orchestrate its operations in order that they exert a form of legal leverage on states.

5.3.3.1 - Direct Impacts of SSCS Actions on Japanese Whaling

The SSCS has declared that its goal is to stop Japanese whaling in the SOWS, thus one can evaluate the effectiveness of SSCS actions in achieving this goal by examining the impact they have had on Japanese whaling. The SSCS measures success quantitatively, and compares Japanese quotas with actual catches to arrive at the number of whales saved.

Table 1, generated from data provided in JARPA Annual Cruise Reports, shows that from 1987 until 2005/06, the seasons prior to SSCS involvement, Japanese whalers consistently filled their quotas, taking between 90-110% of the yearly catch allowed under scientific permits.⁶⁹³ Notably, this was during a time when major ENGOs such as WWF and Greenpeace waged an intense media campaign against whaling, and at times had vessels present in the Southern Ocean. From this information we can build a counterfactual, using years prior to SSCS intervention as baselines. It can be assumed that, barring any external factors, the ICR would continue to reach its quotas, +/- 10%, were it not for SSCS intervention. The only year in which an external factor did appear to influence Japanese whaling was in 2006/2007 when a fire,

⁶⁹² *Ibid*, March 3, 2011.

⁶⁹³ See Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

unrelated to SSCS activity, forced the *Nisshin Maru* to delay whaling operations. Delays due to another fire in 1998/1999 appear to have had minimal impact on reaching that season's quota.

Following the launch of the SSCS's enforcement campaign, Japanese whaling has been sharply reduced. The ICR documents the number of days that its operations were 'interrupted' by "violent actions by anti-whaling groups", and as a direct result has been required to cancel sampling surveys.⁶⁹⁴ The ICR reports that as a result of SSCS actions it has often been required to designate one of its vessels "dedicated to the security task for long time, which resulted limited research activity."⁶⁹⁵ The ICR has also blamed "the continued illegal attacks and sabotage" by the SSCS for ending its seasons early in 2011, 2012 and 2013.⁶⁹⁶

In terms of directly reducing whale harvests, SSCS actions appear to be very effective. The SSCS reports on these numbers, and even sells t-shirts sporting the number of whales it purports to have saved. Cornelissen notes that such reporting serves to demoralize the whalers.⁶⁹⁷ Hammarstedt noted that measuring success in this manner makes it more tangible, real and individual.⁶⁹⁸

⁶⁹⁴ See ICR, SC/58/O7, p.4-5, 19; ICR, SC/59/O4, p.1, 4; ICR, SC/60/O4, p.1, 5; ICR, SC/61/O3, p. 2, 5-6; ICR, SC/62/O3, p. 1, 4.

⁶⁹⁵ ICR, SC/63/O1, p.2.

⁶⁹⁶ ICR, "JARPA II Research Vessels to Return Home," February 18, 2011, available at <http://www.icrwhale.org/pdf/110218ReleaseENG.pdf> (accessed July 14, 2013), and similar press releases in 2012 and 2013, available <http://www.icrwhale.org/News.html>; see also Japan Daily Press, "Record Low Catch for Japan Whaling Season, Sea Shepherd Blamed," April 5, 2013, available at <http://japandailynews.com/record-low-catch-for-japan-whaling-season-sea-shepherd-blamed-0526481> (accessed July 14, 2013); and Brown 2012:161

⁶⁹⁷ Field Journal, February 26, 2011.

⁶⁹⁸ *Ibid*, February 27, 2011.

Table 1: Impact of Activists on JARPA Hunt

Season	Quota (+/- 10% allowance)			Number of Whales Harvested ⁶⁹⁹			Percentage of Quota	Number of Activist Vessels	Days Disruption Over Hunt Duration
	Fin	Minke	Total	Fin	Minke	Total			
1987/1988	0	300	300	0	273	273	91.0%	0	0/70
1988/1989	0	300	300	0	241	241	80.3%	1-GP	10/79
1989/1990	0	300	300	0	330	330	110.0%	0	0/97
1990/1991	0	300	300	0	327	327	109.0%	1-GP	⁷⁰⁰ -/94
1991/1992	0	300	300	0	288	288	96.0%	1-GP	56/112
1992/1993	0	300	300	0	327	327	109.0%	1-GP	-/113
1993/1994	0	300	300	0	330	330	110.0%	0	0/107
1994/1995	0	300	300	0	330	330	110.0%	1-GP	17/109
1995/1996	0	400	400	0	440	440	110.0%	0	0/118
1996/1997	0	400	400	0	440	440	110.0%	0	0/103
1997/1998	0	400	400	0	438	438	109.5%	0	0/98
1998/1999 ⁷⁰¹	0	400	400	0	389	389	97.3%	0	0/78
1999/2000	0	400	400	0	439	439	109.8%	1-GP	27/97
2000/2001	0	400	400	0	440	440	110.0%	0	0/100
2001/2002	0	400	400	0	440	440	110.0%	0	0/101
2002/2003	0	400	400	0	440	440	110.0%	1-SS	0/97
2003/2004	0	400	400	0	440	440	110.0%	0	0/95
2004/2005	0	400	400	0	440	440	110.0%	0	0/92
2005/2006	10	850	860	10	853	863	100.3%	1-SS,1-GP	9/108
2006/2007 ⁷⁰²	10	850	860	3	505	508	59.1%	2-SS, 1-GP	3/76
2007/2008 ⁷⁰³	50	850	900	0	551	551	61.2%	1-SS, 1-GP	⁷⁰⁴ 31/101
2008/2009	50	850	900	1	679	680	75.6%	1-SS	16/103
2009/2010	50	850	900	1	506	507	56.3%	3-SS	31/97
2010/2011	50	⁷⁰⁵ 850	900	2	170	172	19.1%	3-SS	21/52
2011/2012	50	850	900	1	266	267	29.7%	3-SS	15/66

⁶⁹⁹ This number represents the total number of whales landed and does not include those struck and lost, of which there were generally very few, but for which reporting was inconsistent.

⁷⁰⁰ Indicates that value was not reported.

⁷⁰¹ Research was cut short due to a fire on board the research vessel, length of delay unreported.

⁷⁰² Season ended early due to fire on board *Nisshin Maru* factory ship, causing an additional 10 day delay.

⁷⁰³ Note that in all years since 2007-2008 the ICR initially included 50 humpback whales in the original quota, but then decided to suspend the sampling of humpbacks.

⁷⁰⁴ Includes 3 day delay caused by rescue operation for fishing vessel.

⁷⁰⁵ The quota of 850 is number given in the JARPA report, although a higher number (1000) was given at the beginning of the season when Japan announced it would be raising its quota.

In addition to saving whales, crew members emphasized that one of the primary goals of actions was to “make poachers pay” – to take away the financial motivations for exploiting marine life.⁷⁰⁶ The idea is that SSCS actions increase the costs to whalers so that eventually they will be forced to abandon their project. Crew members speculated about the economic impacts of SSCS actions, and worked out rough calculations to determine how much they were costing the whalers.⁷⁰⁷ The actual numbers support these speculations. Reduced harvests have led to reduced revenue from sales of whale meat, with a number of sources reporting that the ICR has been operating in the red. The financial viability of the whaling industry in Japan was already in question prior to the moratorium. Tinch and Phang calculate that since 1988, the sales of whale by-products has experienced a loss of an estimated \$223 million.⁷⁰⁸ The ICR sells whale meat to fund its operating costs which are estimated at \$65-\$76 million annually.⁷⁰⁹ The sale of whale meat is unable to cover all expenses, and as a result, the Japanese government supports the ICR with \$5.4-\$9.7 million annually, with the whaling program having received over ¥30 billion (\$320 million).⁷¹⁰ In addition to lost revenue, SSCS actions have also caused damage to vessels (no precise amounts have been reported to date, see below), and have forced Kyodo to increase security on its vessels: installing defensive netting, water cannons, anti-boarding spikes, at times assigning Japanese Coast Guard officers to vessels and to the designation of one of the three harpoon vessels as a security vessel.⁷¹¹ In 2011 the ICR received an injection of roughly \$30 million, reportedly from tsunami relief funds. Greenpeace reports that 20% of this subsidy went

⁷⁰⁶ *Ibid.*, Hammarstedt, February 23, 2011; Rosie Kunneke, deckhand on the *Bob Barker*, February 4, 2011; February 1, 2011.

⁷⁰⁷ See for example *ibid.*, conversation between Burke and crew member, February 7, 2011; and Potts, February 5, 2011.

⁷⁰⁸ Tinch and Phang 2009.

⁷⁰⁹ Hoek 2010:191; Kanehara 2009:576-577, citing Shuji Yamada, Director-General of fishery Agency, Minutes of the committee on Agriculture, Forestry and Fisheries, House of Councillors, 169th Session, No. 4 (March 27, 2008), p.18; and Sand 2008:64.

⁷¹⁰ Kanehara 2009:576-577; Brown 2012:162; Blok 2008:51 interview with Murakami Mitsuyoshi (ICR), Tokyo, June 2006; Ishii and Okubo 2007:73; Martin Fackler, “Japan: Whaling Group Suffers Financial Loss,” October 2, 2012, available at http://www.nytimes.com/2012/10/03/world/asia/japan-whaling-group-suffers-financial-loss.html?_r=0 (accessed July 14, 2013); Kiroko Tabuchi, “Japanese Subsidies Keep Whaling Industry Afloat Report Says,” *New York Times*, February 7, 2013, available at http://www.nytimes.com/2013/02/08/business/global/japanese-subsidies-keep-whaling-industry-afloat-report-says.html?_r=0 (accessed July 14, 2013); Global Post, “Japanese Turn Against Whaling,” February 21, 2013, available at <http://www.globalpost.com/dispatch/news/regions/asia-pacific/japan/130214/whaling-whalemeat-japanese-food> (accessed September 7, 2013).

⁷¹¹ See for example Field Journal, December 31, 2010; also Martin Kay, “Coast Guard Protects Japanese Whaling Ships,” *Stuff.co.nz*, December 15, 2010, available at <http://www.stuff.co.nz/national/4459945/Coast-guard-protects-japanese-whaling-ships> (accessed July 14, 2013).

to security, specifically to chartering the *Shonan Maru #2* (SM#2) to serve as the fleet's designated security vessel.⁷¹²

Cornelissen noted that damage caused by SSCS activity does not constitute criminal damage – that is, damage to property – but rather lost profits.⁷¹³ This is consistent with the SSCS's emphasis on the proportionality and legality of its actions. Andrea Gordon, the ship's manager, and Cornelissen noted that the costs of repairs which result from a collision (and other forms of property damage) are insignificant compared to lost profits.⁷¹⁴ Also of note is the relative lack of importance attributed to tactics involving throwing projectiles (butyric acid, cellulose powder, 'Mick Jagers'). It was noted by a crew member that these tactics largely served the purpose of keeping 'movement types' happy.⁷¹⁵ Notably it was the SSCS's overall approach that was seen as effective.⁷¹⁶ The SSCS's emphasis on direct leverage supports its claims that the organization is engaging in a form of DA.

5.3.3.2 - Red Tape and Leverage

The SSCS does not appear to rely on moral leverage – the 'mobilization of shame' – which is often seen as the mainstay of INGOs/TAGs. This is not to say that leverage is not an important component of the SSCS strategy. It seems instead to rely on a type of legal leverage. The SSCS uses international law as a means of both protecting itself from prosecution by the authorities, and of exerting pressure on states to intervene. It could be relatively easy for states, such as Australia, to intervene against the SSCS and thus frustrate the organization's ability to operate. Yet Australia continues to allow the SSCS access to its ports and has ignored Japanese pleas to apprehend and prosecute SSCS crewmembers operating in Australian territory.⁷¹⁷ Both

⁷¹² Greenpeace International, "Japan's Whaling Subsidies: The Collapse of the Whale Meat Market," March 2012, available at <http://www.greenpeace.org/international/Global/international/publications/oceans/2012/Japan-whaling-subsidies.pdf> (accessed July 14, 2013); see also Justin McCurry, "Japan Whaling Fleet Accused of Using Tsunami Disaster Funds," *The Guardian*, December 7, 2011, available at <http://www.guardian.co.uk/world/2011/dec/07/japan-whaling-fleet-tsunami-earthquake-funds> (accessed July 14, 2013).

⁷¹³ Field Journal, February 26, 2011.

⁷¹⁴ See *ibid*, Gordon, February 23, 2011; Cornelissen, February 12, 2011.

⁷¹⁵ *Ibid*, February 25, 2011.

⁷¹⁶ *Ibid*, February 21, 2011.

⁷¹⁷ Moffa 2012:211; Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

Moffa and Roeschke suggest that this tolerance can be attributed to the fact that the SSCS, by giving force to environmental laws, provides a public benefit.⁷¹⁸ This alone however does not seem sufficient to explain the protection the SSCS seems to enjoy.

The SSCS appears to be proactive in this respect and protects itself by enveloping its campaigns, vessels, and actions, in a complicated web of international law. This web, in turn, serves to dissuade states from targeting the SSCS, because doing so would open a can of ‘international legal’ worms. Thus law seems to be the mechanism upon which the SSCS relies in order to protect itself while carrying out aggressive actions on the high seas. This is evident in several actions taken by the SSCS. As previously noted, the SSCS claims a mandate from the WCN, uses legal language and claims to enforce international law. The organization operates on the high seas, and in contested waters within the AAT-EEZ. Cornelissen noted that in Antarctica the SSCS can “get away with so much more because it’s in international waters.”⁷¹⁹ The interdiction of a vessel on the high seas by another vessel is a very complicated matter. For a Japanese (or other) vessel to interdict, board, and seize a vessel registered in another nation would invariably raise complicated legal questions. It is the case that

[t]he Southern Ocean is part of the ‘High Seas’ which are those waters that lie beyond the territorial sea or exclusive economic zone of any state. The state of nationality of a ship (the flag state) has exclusive jurisdiction over the ship when it is on the high seas.⁷²⁰

As a result, just as no state has the power to seize or arrest Japanese whalers, similarly states do not have the jurisdiction to intervene against SSCS vessels.⁷²¹ Issues of jurisdiction are further complicated within the AAT-EEZ. Only a handful of states actually recognize Australia’s claims in Antarctica, and as previously indicated, Australia is reticent to enforce any of its national laws within the EEZ of its Antarctic claims for fear of upsetting the ATS.⁷²² Japan is severely limited with respect to taking DA against the SSCS, in so far as the ATS establishes that Antarctica be “used exclusively for peaceful purposes and shall not become the scene or object of international discord” and further that military personnel and equipment are only permitted if they are engaged

⁷¹⁸ *Ibid*, p.212; Roeschke 2009:124.

⁷¹⁹ Field Journal February 16, 2011.

⁷²⁰ UNCLOS Article 92; Maritime New Zealand 2010:pt.15 at 3; Plant 2002.

⁷²¹ Anton 2010a:5.

⁷²² Anton: 2009:350; Anton 2007-2008:21.

in the support of peaceful research, and only after notice is given to other contracting states.⁷²³ Ultimately as Hoek and others note, “confusing and overlapping international laws allow Sea Shepherd to continue their pursuits virtually unpunished.”⁷²⁴

In addition to the legal vagaries of the theatre in which it operates, the SSCS also takes steps to avoid jurisdictional controls.⁷²⁵ The SSCS avoids engaging in confrontational actions within the maritime jurisdictions of states. Cornelissen noted that the SSCS has been forced to change its approach when operating within the jurisdictions of states, and provided examples such as the SSCS operations in the Faroe Islands, where during the previous year, Hammarstedt had gone undercover to document the islands’ pilot whale hunt.⁷²⁶ Crew members explained that the Faroe Island and Canadian seal hunt campaigns, both of which occurred within the national jurisdictions of their respective states, had been difficult because they were ‘protest actions,’ implying that the Antarctic anti-whaling campaign was not.⁷²⁷ The AAT-EEZ represents an exception given the previously discussed challenges faced by Australia with respect to enforcement in these waters. The use of proportionality in tactics also serves the purpose of helping the SSCS remain a gray area phenomenon, and therefore confusing potential legal attacks against it. Violations of SUA or the IRPCS do not invoke universal jurisdiction, however piracy does, and the SSCS is careful to avoid acts of piracy or acts which could be construed as piracy.⁷²⁸ For example during boardings, the SSCS is careful to protect its crew members from accusations of piracy by equipping them with documents for delivery (see International Incidents, Chapter 5.3.3.3, below).

The SSCS further protects itself by operating its vessels with multinational crews. During the 2010-2011 Antarctic campaign, 23 nationalities (including dual citizenships) were represented amongst the crews of the three SSCS ships.⁷²⁹ This dissuades interference on the part of targets or target governments, because “it maximises the number of states which might be

⁷²³ AT, Preamble; Article I(1) and (2), and Article VII (5)c.

⁷²⁴ Hoek 2010:183; see also Caprari 2010:1513; Roeschke 2009:108; Khatchadourian 2007; Corell 1992-1993:781-782.

⁷²⁵ Plant 2002:95-96.

⁷²⁶ Field Journal, January 4, 2011.

⁷²⁷ *Ibid*, November 24, 2010.

⁷²⁸ Ryan 2010:3.

⁷²⁹ The *Bob Barker* had 12 nationalities represented by a crew of 36. See *Bob Barker*, ‘Ship’s Log,’ page 1; Field Journal February 13, 2011; conversation with Hammarstedt and Cornelissen, December 11, 2010; and Phelps Bondaroff 2011:9.

willing and able to take action... on behalf of their nationals against such interference.”⁷³⁰ The selection of multinational crews for vessels and for operations involving small boats and boardings is intentional. Hammarstedt noted that it was particularly useful to have Australian and New Zealand citizens on board “as these are the countries we have to reach.”⁷³¹ Cornelissen noted that the use of multi-national crews is also highly symbolic, demonstrating widespread disapproval of whaling.⁷³² Cornelissen also noted that the SSCS may select the nationality of its top officers in such a way as to put pressure on certain states. He explained that when the SSCS sent the Dutch-registered *Farley Mowat* to eastern Canada for the anti-sealing campaign, Cornelissen (Dutch) and Hammarstedt (US/Swedish) were selected as officers, rather than Watson (Canadian). This had the effect of putting pressure on European states in addition to Canada, and to protect the officers in the event of arrest. When the ship was seized by the RCMP, Cornelissen and Hammarstedt were eventually deported and barred from entering Canada, a much less serious fate than would have befallen Watson.

The SSCS is also strategic concerning where it registers and flags its vessels. It has purposefully selected Dutch registration for its two large vessels, the *Steve Irwin* and the *Bob Barker* in so far as Dutch registration is notoriously difficult to revoke.⁷³³ Vons notes that the Netherlands is a signatory to all the major international conservation conventions which the SSCS claims to enforce, as well as all international human rights conventions, has strong domestic freedom of speech legislation, and no legislation permitting the de-flagging of Dutch vessels.⁷³⁴ SSCS vessels are also registered as ‘motor yachts’ rather than commercial vessels, which would require that the SSCS adhere to more regulations and become more problematic in the event of a collision.⁷³⁵ The SSCS has used other registrations in the past; Vons noted that SSCS vessels have had Canadian, Belizean, British, and Togolese flags removed from its vessels.⁷³⁶

The SSCS also flags its vessels with the intention of putting pressure on states. The SSCS flagged its smaller ‘interceptor’ vessels with an aim of drawing regional actors into the issue, the

⁷³⁰ Plant 1983:141.

⁷³¹ Field Journal, Hammarstedt, February 23, 2011; and see Cornelissen, February 26, 2011.

⁷³² *Ibid.*, February 26, 2011.

⁷³³ *Ibid.*, Hammarstedt, December 16, 2010; and see Willemien Groot, “Sea Shepherd Could Lose Dutch Flag,” *Radio Netherlands Worldwide*, November 10, 2009.

⁷³⁴ Field Journal, Vons, December 25 and 10, 2010.

⁷³⁵ *Ibid.*, Vons, December 25, 2010.

⁷³⁶ *Ibid.*

Gojira was flagged in Australia, and the ill-fated *Ady Gil* was flagged in New Zealand (see example below).⁷³⁷ While flagging its smaller interceptor vessels in this way allows the SSCS to exert additional leverage on target states, it also exposes these vessels to additional scrutiny, and potential prosecution, by flag states. Hammarstedt explained that the first country in which a vessel docks is responsible for handling any legal claims against that vessel, and therefore it is important to select the right country.⁷³⁸ As a result, at the end of the campaign the SSCS arranged for the Australian-registered *Gojira* to terminate its voyage in Tahiti rather than Australia with the rest of the Dutch-registered fleet.⁷³⁹

These calculated manoeuvres indicate that the SSCS takes full advantage of legal means in order to exert leverage on states. This approach can be described as a ‘red tape defensive strategy’ whereby complicated layers of legal issues protect the SSCS from state prosecution, in so far as states prefer to avoid causing complicated international legal incidents. This legal complexity also serves to exert leverage upon states to act. Given the nature of SSCS operations, incidents are inevitable, and when they do occur, given the legal embroilments, states are often obliged to act.

5.3.3.3 - International Incidents

An international incident has the effect of implicating a number of states and ultimately of leveraging one state’s power against another. As Burbach notes, an incident creates a ‘crisis point’ that forces the issue of whaling onto the agenda.⁷⁴⁰ Regarding international incidents, Hammarstedt noted that one can “use these to politicize an issue, to make an environmental issue into a political issue.”⁷⁴¹ It forces states to alter their default position on any issue (having no policy or position on that issue), into being forced to take a position. Incidents invariably involve matters of high politics – questions of sovereignty, international law, and the safety of nationals abroad – which serve as a means of raising the matter of whaling (or other environmental issues) from a secondary issue, to a matter of high politics, and thus increasing the likelihood of state

⁷³⁷ Field Journal, Watson, pre-Operation press conference, December 2, 2010.

⁷³⁸ *Ibid*, Hammarstedt, February 13, 2011.

⁷³⁹ *Ibid*, February 4, 16 and 20, 2011.

⁷⁴⁰ Burbach 2012:28.

⁷⁴¹ Field Journal, February 27, 2011.

action, yet another reason why states tend to want to avoid them. The point made by Jabour and Iliff and Burbach, is that not only does the SSCS benefit from incidents when they occur, but that it will occasionally go about purposefully orchestrating them, and by doing so, be able to exert considerable leverage on the states involved, putting them in complicated and difficult diplomatic positions.⁷⁴²

From examining existing SSCS literature, and from previous operations, it is clear that SSCS actions do trigger international incidents, but it is unclear as to whether they set about intentionally doing so, and the extent to which the SSCS can control outcomes once incidents occur. During ‘Operation No Compromise’ no boardings were attempted, however officers and crew members did discuss the possibility.⁷⁴³ An examination of actions from other anti-whaling operations reveals three particular incidents which stand out as exemplary of the ‘international incidents’ which have occurred as a result of SSCS actions:

Potts-Lane Incident

In January 2008, two crew members of the SSCS vessel *Steve Irwin* boarded the *YM#2* in the Southern Ocean.⁷⁴⁴ The SSCS purposefully selected Australian (Potts) and UK (Lane) citizens for the boarding party and took the legal precaution of equipping them with letters of intent, as a means of pre-empting claims of piracy.⁷⁴⁵ Leading up to and during the boarding, Watson and crew members made constant reference to the creation of international incidents on the program *Whale Wars*; the episode documenting the boarding was called ‘International Incidents R Us.’⁷⁴⁶ Potts notes that the target of the action was primarily the Australian government, and that “because of the situation, they were forced into action,” and required to

⁷⁴² Jabour and Iliff 2009:271; Burbach 2012:3.

⁷⁴³ See Field Journal, January 10 and 16, 2011.

⁷⁴⁴ Field Journal, Potts, December 7, 2010; See for example Heller 2007; Environment News Service, “Sea Shepherd Crewman Released by Japanese Whalers,” January 18, 2008, available at www.ens-newswire.com (accessed April 21, 2010); Potts 2011; *Whale Wars*, Season 1:3 (aired November 21, 2008).

⁷⁴⁵ Kanehara 2009:569, 555, citing Jun Yamashita, Director-General of Resources Management Department of Fishery Agency, Minutes of the Committee on Foreign Affairs, House of Representatives, 169th Session, No.5 (April 4, 2008), p.9.

⁷⁴⁶ Although the SSCS has no editorial control over *Whale Wars*, the episode name was clearly selected to reflect the SSCS’s intentions. See specifically *Whale Wars*, Season 1:3 (aired November 21, 2008); also *inter alia* *Whale Wars*, Season 1:2 (aired November 14, 2008); Season 5:5, at 19:16 (aired July 29, 2012); Season 1:2 (aired November 14, 2008); and see Mills and Ernst 2012:212.

send a vessel to the area.⁷⁴⁷ He suggested that the message the boarding would send was “we just boarded a ship, so why can’t you?”⁷⁴⁸

The boarders were detained and the SSCS immediately accused the Japanese of kidnapping.⁷⁴⁹ What ensued was a complicated diplomatic incident involving the Australian, British and Japanese governments to negotiate the release of the British and Australian citizens involved. Cornelissen noted, “governments are sometimes unwilling to act, so having an Australian board a Japanese ship forces Australia to act to get them off, which creates media attention.”⁷⁵⁰ In addition to drawing international attention to the continued and controversial Japanese whaling program in the area, the incident forced the states of the nationals and of the vessels involved to negotiate the tangential issue of the return of detained nationals, one which involved international laws unrelated to the question of whaling, but extremely important with respect to questions of state sovereignty.

Bethune and *Ady Gil* Incident

The New Zealand-registered *Ady Gil* was an SSCS trimaran which was used during the 2009-2010 campaign. In January 2010 during an engagement with the *SM#2*, the *Ady Gil* was struck and cut in half. The damaged vessel was later scuttled by the SSCS. Subsequently, the captain of the *Ady Gil* (Pete Bethune, a New Zealand national) was detained by the Japanese when he boarded the *SM#2*, in an attempt to make a citizen’s arrest of the whaling vessel’s captain. Bethune was returned to Japan where he was charged with several minor offences and given a two year suspended sentence.⁷⁵¹ Ryan notes that what is of interest is what “Bethune was *not* charged with,” specifically piracy or terrorism offences.⁷⁵² Again the SSCS attempted to protect their boarder by providing him with legal cover, in this case the citizen’s arrest. Ryan

⁷⁴⁷ Field Journal, Potts also noted that the incident also “helped make whaling an issue in Japan,” March 4, 2011.

⁷⁴⁸ *Ibid.*

⁷⁴⁹ Besel and Besel 2010:171.

⁷⁵⁰ Field Journal, February 26, 2011.

⁷⁵¹ See *inter alia* Bethune 2010; Ryan 2010; News.com, “Charges Against Sea Shepherd Captain Pete Bethune Are Bogus, Say Activists,” April 2, 2010, available at www.news.com.au (accessed April 19, 2010); *Whale Wars*, Season 3:6-14 (aired between July 9, 2010 and September 6, 2010).

⁷⁵² Ryan 2010:10; also Field Journal, Burke, February 14, 2011.

notes that such a move was legally problematic.⁷⁵³ Several countries were involved as a result of the incident, including New Zealand, Australia (within whose EEZ the incident occurred), and Japan. With regards to the initial collision, lengthy investigations initiated by the New Zealand and Australian governments found that both parties were at fault, and no further actions were taken.⁷⁵⁴

Forest Rescue Boarding

In addition to these two prominent examples, a further boarding was executed by three members of Forest Rescue Australia, a land-based radical environmental group which campaigns on forestry issues in Western Australia.⁷⁵⁵ The SSCS assisted the activists with the boarding, by allowing them to use the *Steve Irwin* as a staging platform and through the use of SSCS RIBs. Three Australian citizens boarded the *SM#2* (a designated security vessels the whaling fleet has employed during various seasons), on January 8, 2012, claiming to be at 32°57'48"S, 115°20'24"E, which would have put the location of the Japanese vessel at 16.2 nautical miles off the coast of Western Australia. This placed the Japanese vessel within the EEZ of continental Australia, and not in the contested EEZ of the AAT. The SSCS and the activists describe the goal of the action as "illustrate[ing] the lack of action by the government to end illegal whaling in the Southern Ocean and to attempt to slow down the *Shonan Maru #2* to allow the *Steve Irwin* to escape the tail,"⁷⁵⁶ to "[f]ocus international public attention on Japan's continued illegal whaling operations and the lack of action by the Gillard government...[and to e]mbarrass the Japanese security vessel by breaching their security thereby causing them to lose face."⁷⁵⁷ The action was

⁷⁵³ In these jurisdictions, a citizen's arrest is generally only permitted for "crimes in progress": Code of Criminal Procedure (*keiji soshou hou*) 1948, s213; Crimes Act 1961 (NZ), s35 crimes Act 1914 (Cth), s3Z quoted at fn 176, see Ryan 2009:156.

⁷⁵⁴ Maritime New Zealand 2010; Australian Maritime Safety Authority 2010.

⁷⁵⁵ See Forest Rescue, available at <http://www.forestrescue.com.au/> (accessed August 27, 2013).

⁷⁵⁶ SSCS, "The *Shonan Maru* Boarding Incident," January 11, 2012, available at <http://www.seashepherd.org/news-and-media/2012/01/11/the-shonan-maru-2-boarding-incident-1313> (accessed August 27, 2013); Forest Rescue, "Operation Tree Shepherd," January 7, 2012, available at <http://www.forestrescue.com.au/whalingshipboarding.htm> (accessed August 27, 2013).

⁷⁵⁷ SSCS at *Ibid*.

unsuccessful in delaying the security vessel, and the boarders were detained.⁷⁵⁸ The activists were transferred to an Australian customs vessel without any charges laid, on January 12, 2012.⁷⁵⁹ Newspaper articles claimed that the release of the activists without a charge avoided a ‘diplomatic row.’⁷⁶⁰ The use of activists from another organization appears to be a move on the part of the SSCS to provide distance between itself and the boarding (to avoid a repeat of the Bethune incident), and to place additional pressure on the Australian government to intervene against Japanese whaling operations and enforce its own laws, in so far as the activists represented an Australian-based NGO.

The afore mentioned actions indicate a chronology of SSCS and Japanese learning with respect to boardings in particular, and demonstrate both the power of boardings and the risks. The Potts-Lane Incident was certainly experimental: the SSCS had no way of knowing how the Japanese would react, and appears to have caught both the Japanese and Australian governments off guard. The strength of boardings is that they produce dramatic media events, attracting considerable press. The Potts-Lane Incident arguably played an important role in making whaling a national issue in Australia.⁷⁶¹ Such incidents also tend to level acute pressure to bear on states. Citizens are detained and subsequently the negotiations must take place are consequences consistent with each of the incidents. These incidents appear as win-win scenarios for the SSCS because even in the worst case scenario, where activists are detained and subsequently charged, the attention of states and the public is dramatically shifted to the whaling issue. But such outcomes are far from ideal. Comparing the final outcomes of each of the

⁷⁵⁸ Reuters, “Activists Detained on Japan Whaling Vessel: Sea Shepherd,” January 8, 2012, available at <http://www.reuters.com/article/2012/01/08/us-australia-japan-whaling-idUSTRE80702G20120108> (accessed August 27, 2013).

⁷⁵⁹ The Sydney Morning Herald, “Three Whaling Activists Transferred to Customs Boat,” January 13, 2012, available at <http://www.smh.com.au/environment/whale-watch/three-whaling-activists-transferred-to-customs-boat-20120113-1pyyb.html> (accessed August 27, 2013).

⁷⁶⁰ The Guardian, “Japan to Release Australian Activists Who Boarded Whaling Ship,” January 10, 2012, available at <http://www.theguardian.com/world/2012/jan/10/japan-release-australian-activists-whaling-ship> (accessed August 27, 2013).

⁷⁶¹ See for example Simon Lauder, “Rudd Urged to Issue Whaling Ultimatum,” *ABC News*, December 11, 2009, available at <http://www.abc.net.au/news/2009-12-11/rudd-urged-to-issue-whaling-ultimatum/2580194> (accessed June 8, 2013); and see Vivienne Ortega, “Labor Breaks Anti-Whaling Election Promise,” *ABC News – The Drum*, May 25, 2009, available at <http://www.abc.net.au/news/2009-05-25/labor-breaks-anti-whaling-election-promise/1693700> (accessed June 8, 2013).

incidents provides evidence that outcomes are highly unpredictable, and once triggered, that the SSCS has little control over the outcome.

A lack of control of outcomes is further evidenced by an examination of the *Ady Gil* Incident. The incident shone the world spotlight on the whaling issue, but the significance of the issue depended largely on the morally superior position granted the SSCS as a result of the sinking of the *Ady Gil*. There was sufficient reason for people to believe that the SSCS did not intentionally ram a 747 ton steel ice-reinforced harpoon vessel with a 13 ton Kevlar-coated fibreglass trimaran. While the SSCS benefited from positive press attention, it did not orchestrate the event. Enticing targets into disproportionate responses is consistent with conventional INGO/TAG strategies, but is a dangerous prospect on the high seas.⁷⁶² If the SSCS were to pursue international incidents in this manner, their actions could appear reckless and this would arguably counter any benefits that could conceivably be gained from such an incident. Furthermore, such strategies rely on activists presenting themselves as innocents; making such a claim is difficult given the aggressive nature of SSCS actions.

It appears that basing a strategy exclusively on the triggering of international incidents would be haphazard at best. The use of boardings by the SSCS appears opportunistic, rather than central to its strategy. Incidents are inevitable given the confrontational nature of SSCS actions, but the SSCS rarely goes about triggering them purposefully. It seems that is not the incidents themselves that serve to power the SSCS strategy, but rather the broader power that incidents bring to bear on states, as a form of legal leverage. These incidents exemplify an additional component of SSCS actions; that they do not call on states to take action, but rather attempt to force states into action.

5.3.3.4 - Influence on States

The SSCS is ultimately trying force Japan to stop whaling, with its actions directly targeting Japanese vessels, but the SSCS also successfully brings the power of other states to bear against Japan. This is particularly the case with Australia. There is evidence that SSCS actions also served to draw the Chilean government to leverage both Australia and Japan. SSCS

⁷⁶² See for example Chenoweth and Stephan 2012.

actions, not only boardings, but all aspects of SSCS actions, place considerable pressure upon governments to act. Requests of an INGO/TAG for a government to intervene in an issue are easily and often ignored by states. While SSCS press releases may beseech the Australian government to intervene, the power of SSCS is that these requests are supported with actions that compel the Australian government take notice and ultimately to intervene.

Australia

The SSCS fleet operates out of Hobart, Tasmania and within the AAT-EEZ for a considerable portion its campaigns. The Australian government could easily frustrate the SSCS's ability to operate, and has at times done so; however these efforts were largely symbolic. The Australian government appears to be simply 'going through the motions' in order to placate requests from Japan while not upsetting Australian voters, who are generally anti-whaling and supportive of SSCS actions. The only recorded incidents of Australian interference were 1) prior to the campaign when Hammarstedt and Watson had difficulty getting visas, although they eventually did receive visas.⁷⁶³ 2) When the AFP searched the vessel at the conclusion of the campaign. With the investigation appearing to have been conducted solely to placate Japanese requests. The searched warrant for the *Steve Irwin* and *Bob Barker* contains a detailed documentation of SSCS actions against Japanese vessels. Given the level of detail and phrasing this list was most likely provided by the Japanese government.⁷⁶⁴ The investigation, and similar investigations during previous seasons, failed to reach any conclusions.

3) The Australian government has on occasion surveilled SSCS-ICR interactions. On January 10, the *Bob Barker* was over-flown by an aircraft (most likely an Orion) without markings. The plane was hailed. Its origins were unverifiable due to garbled communications, however the pilot spoke English and when requested, declined to provide information concerning

⁷⁶³ Watson and Hammarstedt encountered similar problems were encountered in 2009. In 2011 the SSCS's helicopter pilot was denied a visa. See Field Journal, 'visa troubles,' Burke, December 10, 2010; Hammarstedt, August 30, 2010; Hammarstedt and Cornelissen, December 11, 2010; SSCS, "The Sea Shepherd Dilemma Down Under," October 6, 2009, available at <http://www.seashepherd.org/news-and-media/2009/10/06/the-sea-shepherd-dilemma-down-under-293> (accessed August 2, 2013); SSCS, "Australian Government Attempts to Sabotage Sea Shepherd's Campaign to Defend Whales," December 5, 2011, available at <http://www.seashepherd.org/news-and-media/2011/12/05/australian-government-attempts-to-sabotage-sea-shepherds-campaign-to-defend-the-whales-1292> (access August 2, 2013).

⁷⁶⁴ See warrant, *supra* note 556.

the whereabouts of the Japanese factory ship.⁷⁶⁵ The New Zealand commissioner noted that the plane was not one of theirs, and speculated that it was likely Australian in so far as it had not followed New Zealand protocols.⁷⁶⁶ The over-flight of the *Bob Barker* (and the *Steve Irwin*) did not represent the only time that the Australian government was forced to send assets to the Southern Ocean as a result of SSCS operations. In 2008 the Australian government sent the *Oceanic Viking* to the Southern Ocean to monitor the whaling fleet and to “collect evidence for potential legal action.”⁷⁶⁷ This customs vessel was ultimately used to transfer Potts and Lane from the *YM#2* to the *Steve Irwin*. In 2012, the Australian government was forced to send the *Oceanic Protector* to recover the Forest Rescue activists, at considerable tax payer expense, insisted Prime Minister Julia Gillard.⁷⁶⁸

In addition to forcing the Australian government to send assets into the Southern Ocean, SSCS actions have also forced the Australian government to take a position on whaling. As discussed in the previous chapter, until 2007 the position of the Australian government was to not enforce the EPBC against foreign nationals. This position was logical, in so far as it avoided potentially upsetting the ATS, and thus antagonising Japan, one of Australia’s largest trading partners.⁷⁶⁹ However, after 2007, the Australian government took an increasingly firm position, culminating in its taking Japan before the ICJ. As discussed, the HSI case cannot fully explain the government’s dramatic increase in interest in whaling and adoption of a proactive policy. Nor can the government’s sudden action be solely attributed to an increased public awareness and interest in whaling due to the attention the issue received as a result of SSCS actions, although this likely contributed to whaling becoming an election issue in 2007. Election promises could be easily fulfilled by a token gesture, such as the short-lived ‘whale envoy’ to Japan.⁷⁷⁰

SSCS actions appear to have brought both direct and indirect pressure to bear on the Australian government. Media attention of SSCS actions clearly stirred up public sentiment against whaling, and did so for a sustained period of time, gradually influencing Australian

⁷⁶⁵ See Field Journal and Daily Action Log, January 10, 2011; and see Phelps Bondaroff 2011:30, fn.53.

⁷⁶⁶ Interview with Gerard van Bohemen, New Zealand Commissioner to the IWC, Jersey, July 12, 2011.

⁷⁶⁷ Government of Australia, “Question Time Brief: Whaling – Australian Government Role, Including Boarding of Sea Shepherd,” from documents obtained under Freedom of Information Act 1982 request, June 16, 2010, FOI-135; and see Anton 2009:339; Anton 2007-2008:19

⁷⁶⁸ The Sydney Morning Herald, “Three Whaling Activists Transferred to Customs Boat,” January 13, 2012, available at <http://www.smh.com.au/environment/whale-watch/three-whaling-activists-transferred-to-customs-boat-20120113-1pyyb.html> (accessed August 27, 2013).

⁷⁶⁹ Hutchinson 2006:1.

⁷⁷⁰ Epstein and Barclay 2013:110-111.

politics until whaling became an election issue. SSCS actions also seem to have exerted direct pressure on the Australian government. In acting to enforce Australian and international law in Australian waters, the SSCS demonstrated a fundamental failure on the part of the Australian government, notably the failure of the Australian government to enforce its own laws and to uphold its sovereignty within its territory. When Watson criticizes the Australian government as being “submissively loyal to the demands of the Japanese government”, he is speaking the language of sovereignty and he is speaking directly to government.⁷⁷¹ The Australian government cannot afford to ignore this message when it is backed up with confrontational and aggressive actions in its own waters. It is this kind of legal leverage, which is both persistent and acute, that makes SSCS effective in changing the behaviours of states.

Chile

During ‘Operation No Compromise’ the SSCS was also able to use the Chilean government to leverage Japan and indirectly to influence Australia, though in this case the type of leverage was much more conventional. In an attempt to evade the *Bob Barker*, the *Nisshin Maru* approached Chilean waters mid-February 2011. The SSCS informed the Chilean authorities of the approaching factory ship via an update on their Facebook page and through informal contacts.⁷⁷² In response, Senator Juan Pablo Letelier condemned the actions of the whalers, and called on authorities to prevent entry and to enforce the law.⁷⁷³ Chile quickly responded to this challenge to its sovereignty, and the Chilean Navy announced that it was monitoring the vessel (through communication with the SSCS), and that it was mobilizing a naval vessel to intercept and detain the factory ship should it enter its EEZ.⁷⁷⁴ The government of

⁷⁷¹ SSCS, “The Sea Shepherd Dilemma Down Under,” October 6, 2009, available at <http://www.seashepherd.org/news-and-media/2009/10/06/the-sea-shepherd-dilemma-down-under-293> (accessed August 2, 2013); and see Field Journal, Watson quoted in pre-Operation press statement, December 2, 2010.

⁷⁷² Field Journal, Cornelissen, February 16, 2011.

⁷⁷³ Publimetro, “Buque de caza de ballenas está a punto de entrar a Chile y el tema es trending en Twitter,” February 15, 2011, available at <http://www.publimetro.cl/nota/cronica/buque-de-caza-de-ballenas-esta-a-punto-de-entrar-a-chile-y-el-tema-es-trending-topic-en-twitter/xIQkbo!ajryYbuU69TTM/> (accessed August 27, 2013).

⁷⁷⁴ Field Journal, Cornelissen, February 16, 2011; and *Whale Wars*, Season 4:10, at 10:40 (aired August 12, 2011); see also Armada de Chile, “Armada monitorea a buque ballenero japonés,” February 15, 2011, available at http://www.armada.cl/prontus_armada/site/artic/20110215/pags/20110215212447.html (accessed August 27, 2013).

Chile was in fact monitoring the whaling vessels through the SSCS. Cornelissen was in direct conversation with officials in the Chilean Navy, and provided them with hourly updates on the position of the factory ship.⁷⁷⁵ Just prior to entering the water of Chile's Antarctic claim (but not its EEZ), the *YM#3* disengaged.⁷⁷⁶ The *Nisshin Maru* maintained an easterly course, until the morning of February 18, 2011, when it abruptly altered its course, turning north, within a nautical mile of the EEZ of Chile's Antarctic claim.⁷⁷⁷ The Japanese were unwilling to risk the political and material consequences of an adverse Chilean reaction if they entered Chile's continental EEZ.

Cornelissen described the role that the SSCS played as a case of simple monitoring, stating that the SSCS was "relaying information on the whereabouts of a possible illegal entry into Chilean waters."⁷⁷⁸ While the SSCS had no control over the direction of the whaling ship, it was responsible for it fleeing beyond its designated whaling grounds and into this political mine field. Without the SSCS, the Japanese would have had no reason to be in that part of the world, or of risking interdiction by the Chilean navy. The SSCS was able to frame Chile's intervention in order to put further pressure on the Australian government. As Burke noted, Chile has made Australia appear even worse, because after years, they've done nothing comparable.⁷⁷⁹ This type of leverage against Australia involves shame, not of the moral kind, but rather the SSCS appears to be leveraging a type of legal shame.

5.3.4 - Accountability Politics.

The conventional image of INGO/TAG accountability politics is one of observation and of documentation. Accountability politics generally entails monitoring, which involves activists gathering information and documenting instances of non-compliance with treaties and agreements. This information is then disseminated through various means, serving to shame non-

⁷⁷⁵ See Daily Action Log, February 17, 2011 and Ships Log, February 17, 2011; Field Journal, Stokes, February 16, 2011; SSCS, "Chile Seeks to Intervene Against Japanese Whaling," February 16, 2011, available at <http://www.seashepherd.org/news-and-media/chile-seeks-to-intervene-against-japanese-whaling-spanish-translation-to-follow.html> (accessed August 27, 2013).

⁷⁷⁶ Field Journal, February 15, 2011.

⁷⁷⁷ Daily Action Log, February 18, 2011; *Whale Wars*, Season 4:10 (aired August 12, 2011).

⁷⁷⁸ Field Journal, February 26, 2011.

⁷⁷⁹ *Ibid*, February 16, 2011; see also Cornelissen, February 26, 2011.

compliers by bringing their non-compliance to light, or by leveraging other actors to intervene. The SSCS takes monitoring a step further, attempting to enforce laws through confrontational action. The organization also appears to take into consideration its ability to effectively enforce existing laws and agreements when it selects the issues upon which it campaigns.

5.3.4.1 - From Monitoring to Enforcing

The SSCS goes to considerable lengths to present itself as a law enforcement organization through the use of legal justifications, language, imagery, practices and proportionality in its actions. The organization also attempts to exert legal leverage on states.

Clearly an important component of SSCS strategy is action itself. The action not only produces direct results (disrupting or halting illegal and environmentally harmful activity), but it also acts as a powerful focal point, exerting legal leverage on states. Hammarstedt summarized SSCS goals, stating that one of the principal goals is to “inspire world governments to uphold international conservation law,” and with an operational goal to “get Japan to leave the Antarctic Whale Sanctuary.”⁷⁸⁰ Vons highlighted the importance of action in sending this message, positing that “If a state signs a law and then doesn’t follow it, it doesn’t matter until a group comes along and says ‘Hey! You signed this,’ [which] puts them in a bind.”⁷⁸¹ The SSCS is sending the message, to states, that international laws can and should be enforced, by enforcing these laws themselves. In so doing, the SSCS neutralizes any arguments which suggest that enforcement is impossible or impractical.

Given the centrality of law enforcement to SSCS actions, officers and crew members were asked whether the SSCS would still be acting against the Japanese in absence of the IWC Moratorium. They consistently replied that the SSCS would still be in the Southern Ocean, and rather than providing moral or ecological arguments, cited additional international legal violations on the part of the Japanese.⁷⁸² The law enforcement frame remains central.

⁷⁸⁰ *Ibid*, February 23, 2011.

⁷⁸¹ *Ibid*, Vons, February 5, 2011; and see Cornelissen, January 26, 2011.

⁷⁸² See Field Journal, Potts, “it’s still a sanctuary,” Fiona McCuaig, Quartermaster and rescue swimmer on the *Bob Barker*, citing other laws (AAT, CITES, ATS, UN 82’Convention, January 4, 2011; and Burke, February 14, 2011.

Moving beyond monitoring to the actual enforcement of laws was presented as a logical step, and the only remaining viable option for effectively saving whales after other methods had been exhausted, but was also presented as an effective strategy given the political opportunity structure. Hammarstedt argued that “we have the public on our side, where do you go from there? Governments are already putting pressure on Japan to stop, it’s already illegal in more ways than you can count, all that’s left is to do the job yourself.”⁷⁸³

5.3.4.2 - Issue Selection

The SSCS’s focus on achieving direct results and using its ‘enforcement’ frame is also evident in the organization’s issue selection. When asked about issue selection, crew members provided the following replies:

Hammarstedt: whaling selected due to “personal [organizational] history, flagship species (we already have the public on our side), as well as the right laws in place, so much work has already been done on the issue, and we are at the finishing line.”⁷⁸⁴

Potts: selecting issues “that are winnable, because of public opinion or international laws, or some country’s laws. Somewhere we have a foot to stand on.”⁷⁸⁵

Amanda: “whaling is a small issue, but we can actually stop whaling today.”⁷⁸⁶

Mike: “whaling is not as big as climate change, but it is symbolic, to show people that we can intervene.”⁷⁸⁷

Hammarstedt’s reference to the organization’s history does pointedly explain why the SSCS campaigns on whaling, but his statement also suggests other components of SSCS issue selection echoed in the statements of the other crew members. Issues are selected partially based on ‘winnability’ and the ability to achieve tangible (direct) results (Potts and Amanda). While one would expect an organization to select winnable issues, this is not necessarily always the case,

⁷⁸³ *Ibid*, Hammarstedt, February 23, 2011, and January 30, 2011.

⁷⁸⁴ *Ibid*, Hammarstedt, January 30, 2011.

⁷⁸⁵ *Ibid*, Potts, March 4, 2011.

⁷⁸⁶ *Ibid*, Amanda, journalist on the *Bob Barker*, January 22, 2011.

⁷⁸⁷ *Ibid*, Mike, Leading Seaman on the *Bob Barker*, January 18, 2011.

sometimes issues are symbolic of a larger issue. For many, in the early anti-whaling campaign, whales were seen as a beachhead, such that if we could not protect whales all other environmental efforts were in vain. The SSCS is not merely trying to ‘make a statement,’ it is trying to achieve something concrete, which supports the classification of SSCS strategy as a form of DA. Mike’s statement initially appears to suggest the opposite, however he notes that whaling is not a symbol for the environment in general, but rather a symbol that the people can intervene, and engage in DA, and by so doing achieve results.

A central component to SSCS issue selection is the existence of pre-existing legal frames upon which to base its enforcement claims (Hammarstedt and Potts). Having a ‘legal foot to stand on’ appears important in providing the organization with a license to engage in confrontational actions, with ‘international legal red tape’ serving to shield the organization from prosecution. Hammarstedt explained that “upholding international law gives us more flexibility, we couldn’t target people who engaged in legal or commercial killing.”⁷⁸⁸ The SSCS’s choice to campaign on whaling is undoubtedly predicated upon its historical focus on this issue, however, as previously explored, whaling persists in several locations around the globe. The SSCS’s focus specifically on Antarctic whaling suggests that these other factors may have been significant in influencing the organization to focus upon Antarctic whaling. The examination of the SSCS’s bluefin tuna campaign will better serve to isolate strategic concerns which influence SSCS issue selection.

⁷⁸⁸ *Ibid*, Hammarstedt, February 23, 2011.

CHAPTER 6 – UNCONVENTIONAL STRATEGIES IN IR – DIRECT ACTION

6.1 - Unravelling the SSCS Puzzle

In seeking to explain SSCS strategy, a first step is to examine existing theory. While there are aspects of conventional INGO/TAG strategy in the actions of the SSCS, it is clear that these are not the primary objectives of the SSCS. Two major themes emerge from observations of the SSCS's anti-whaling operations. Firstly, that the organization makes efforts to achieve direct outcomes, and secondly that there is a pervasive reference to international law in virtually every aspect of SSCS operations.

The first of these themes points to the strategy of direct action (DA). DA is best understood in the domestic context, and is at the fringe of the INGO/TAG literature. The overall approach of DA – one of seeking to bring about direct change – seems to explain many of the SSCS's actions. This chapter will explore DA, positioning the SSCS's use of DA within the existing literature on this strategy. Explaining SSCS strategy as DA, carried out in the international arena solves only a portion of the puzzle. Several SSCS actions and their effects cannot be fully explained using the framework of DA. Components of SSCS strategy relating to the second identified theme, such as the SSCS's extensive efforts to portray itself as an international law enforcement and anti-poaching organization, and the type of persistent leverage it exerts on states through its international law enforcement claims, and the acute pressure leverages on states as a result of international incidents, suggest that SSCS strategy relies on additional mechanisms. An examination of the SSCS's use of DA, in light of these other components indicates that the organization engages in the direct enforcement of international laws, using the outcomes of DA as one of, but not the only, enforcement mechanism.

6.2 - Direct Action

6.2.1 - DA in the IR Literature

Despite an extensive literature on INGOs and TAGs, very little attention has been paid to the use of DA in IR. The coverage which DA receives often fails to understand and to accurately classify this strategy. DA is also often seen as being almost exclusively part of domestic repertoires.⁷⁸⁹ The TAG repertoires described by Keck and Sikkink constitute indirect forms of action. Information and symbolic politics rely on the release of information and framing in order to shape public perception. Leverage politics seeks the intervention of more powerful actors. Economic forms of leverage, such as boycotts or divestment still rely upon NGOs and TAGs convincing the public to boycott a company or product, or to divest. Insider strategies remain indirect, because regardless of how involved an NGO/TAG is within an institution, it must convince other actors within that institution (through lobbying, information politics etc.) to enact policies and to engender agreements. Monitoring and accountability politics rely on ‘naming and shaming’ and upon other indirect means of compelling compliance. These strategies all involve varying degrees of “persuasion, socialization, and pressure.”⁷⁹⁰ Actions which seek to achieve direct outcomes – DA – are conspicuously absent from the literature.

DA has received the most attention from IR scholars as a result of its use by ‘direct action networks’ to disrupt the meetings of international institutions.⁷⁹¹ As a consequence of these actions, IOs have made an effort, in recent years, to conduct their meetings in hard-to-reach locations.⁷⁹² Bennett contrasts NGOs, “who primarily seek relations with governmental entities,” with direct action networks, which are “involved in all manner of political relations building from simply trying to shut down trade meetings, to experimenting with stand-alone regulatory systems to monitor and discipline manufacturers and entire industrial sectors.”⁷⁹³ While many of these efforts do clearly constitute DA, others strain the boundaries of our understanding of the term, with such a broad definition doing little to further our understanding of DA as a distinct

⁷⁸⁹ Jasanoff 1997:588; see also Rootes 2008:81.

⁷⁹⁰ Keck and Sikkink 1998:16; and see Eilstrup-Sangiovanni and Phelps Bondaroff 2014; Routledge, Nativel and Cumbers 2008.

⁷⁹¹ Bennett 2005:203; O’Neill 2004:248; Tarrow 2001:8-9.

⁷⁹² O’Neill 2004:248.

⁷⁹³ Bennett 2005:222-223, 209 and 214.

strategy. One of the challenges concerning the treatment of DA in the IR literature is that it is too often poorly defined and at times used to describe actions which are not, in fact, direct.

It should be noted that the term direct action networks, in other instances referred to as environmental direct action movements or groups, has come to be used to refer to groups of activists who emphasize DA as their preferred repertoire. This does not necessarily suggest that all of their actions constitute DA, and the focus here is on the strategy itself.⁷⁹⁴ Therefore, for clarity, when reference is made to DA, it is with specific reference to the strategy of DA and not to groups or networks which may have incorporated it into their repertoires.

DA has received some attention in the literature where it is defined as militant protesting or militant symbolic politics. Keck and Sikkink depict 'Direct Action' and 'Direct Confrontation' as forms of protest and symbolic politics, as does Gavin.⁷⁹⁵ Carter also sees DA "as a means for people to exert pressure on governments or other powerful institutions such as business corporations."⁷⁹⁶ Finnemore and Sikkink note that "deliberately inappropriate acts ... can be powerful tools for norms entrepreneurs seeking to send a message and to frame an issue."⁷⁹⁷ Wapner sees DA as a method by which groups generally seek to raise awareness of environmental issues, or to "disseminate an ecological sensibility."⁷⁹⁸ For him, DA is symbolic, comprised of "media stunts, exciting images orchestrated to convey a critical perspective toward environmental issues."⁷⁹⁹ Wapner describes DA as attempting to achieve two outcomes: 1) to attract media attention – confrontational actions play to the media's fascination with "sex, scandal, and violence," drawing attention for an issue.⁸⁰⁰ And 2) DA is used to illustrate the depth of concern felt for an environmental threat.⁸⁰¹ By assuming increased personal risk, activists ultimately demonstrate their moral commitment to the cause while at the same time underlining "how serious they consider certain environmental threats to be."⁸⁰² In this instance, confrontation is used not to achieve a specific objective, but to *signal* the perceived severity of a problem by exposing activists to high personal costs and risks.

⁷⁹⁴ See for example Doherty, Plows and Wall 2007:805; Doherty, Plows and Wall 2003.

⁷⁹⁵ Gavin 2010:460; see discussion in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁷⁹⁶ Carter 2005:3.

⁷⁹⁷ Finnemore and Sikkink, 1998:897; see also Emel and Wolch 1998:518.

⁷⁹⁸ Wapner 1995:336 and 322.

⁷⁹⁹ *Ibid.*, p.320-321.

⁸⁰⁰ *Ibid.* p.321; and see Dale 1996:149; Sunday Times Insight Team 1986:120.

⁸⁰¹ Wapner 1995:321.

⁸⁰² *Ibid.*; see also Plows, Wall and Doherty 2004:208; Letcher 2003:72.

Whether it is attempting to change the mind of officials or of the public, IR literature generally describes DA as militant protest or symbolic politics. An organization whose use of ‘DA’ seems to conform to this definition is Greenpeace, which frequently incorporates various forms of DA into its image events, contributing to the blurring of the distinction between symbolic and direct forms of actions.⁸⁰³ Greenpeace’s actions remain primarily image events whereas a key characteristic of DA is that it seeks direct outcomes first.⁸⁰⁴ While DA may contain symbolic elements, its primary purpose is not symbolic politics, but the achievement of direct results.

6.2.2 - Direct Action Defined

DA finds its origins in the domestic arena in repertoires of the early radical labour movement.⁸⁰⁵ Within a labour context, the term was used to refer to industrial actions such as strikes and boycotts. These were not symbolic protests. They were designed “[t]o strike the employers’ pocketbooks, their real souls.”⁸⁰⁶ Drawing on both activist and academic sources, a clear definition of DA can be presented as follows: a form of action whereby activists seek to directly enact the changes they desire or to stop actions to which they are opposed.⁸⁰⁷ As the name suggests, DA seeks “to have an immediate impact on a problem or its causes,”⁸⁰⁸ and “the means and ends become effectively, indistinguishable.”⁸⁰⁹ Or as Hammarstedt noted, “DA gets direct results.”⁸¹⁰ Doherty elaborates, “[n]ot content to try to influence politicians or institutions, protesters have seen direct action as disruption seeking to delay environmentally damaging projects and to escalate their costs.”⁸¹¹ DA “is totally direct: it’s real and not just mediated politics.”⁸¹² DA is not a form of protest whereby activists entreat other actors to intervene on

⁸⁰³ Plant 2002:77, 76; DeLuca 1999:1.

⁸⁰⁴ Durland 1987; and see Rootes 2008:86, 88.

⁸⁰⁵ Carter 2005:6; Tarrow 2005:158-159.

⁸⁰⁶ Green 1993:328, quoting Spargo 1913.

⁸⁰⁷ See *inter alia* Graeber 2009:207 citing Beyer-Arensens 2000:11; Doherty, Plows and Wall 2003:670; Jordan 2002:62; Doherty, Paterson and Seel 2000:1.

⁸⁰⁸ Jones 2004:137-138.

⁸⁰⁹ Graeber 2009:210.

⁸¹⁰ Field Journal, February 27, 2011.

⁸¹¹ Doherty, Paterson and Seel 2000:2.

⁸¹² Doherty 2000: 67 citing Carey, *Squall*, vol.9, 1995:22; and see Doherty, Plows and Wall 2003:670.

their behalf; instead activists take action into their own hands, entirely bypassing mediators. Direct action is a means of “building the future now,”⁸¹³ proactively seeking to bring about change.⁸¹⁴ As DA does not constitute protest, its practitioners cannot accurately be referred to as ‘protesters.’

As to the legality of DA, Jones notes that DA “may be legal or illegal, overt or covert, sardonic or sober,” suggesting that DA need not necessarily be unlawful.⁸¹⁵ While it is often associated with law-breaking, as with environmentally motivated sabotage, or ecotage,⁸¹⁶ DA can also include constructive acts such as community or guerilla gardening, soup kitchens and free schools (though for the context of this study the focus shall be on confrontational forms of DA).⁸¹⁷ Similarly, while DA may be “confrontational, disruptive and often illegal” it is not necessarily violent.⁸¹⁸ There is an extensive debate within academic and activist circles as to whether property damage, for example, constitutes violence.⁸¹⁹ Generally speaking, the consensus amongst activists who are likely to support the use of DA, is that engaging in potentially violent acts (whether this constitutes targeting property or otherwise), depends on “tactical judgements rather than upon a philosophical commitment to non-violence.”⁸²⁰

6.2.3 - The Strategy of Direct Action

The goal of DA in the context of environmental activism is to protect the environment. DA seeks to accomplish this: 1) by stopping or preventing environmentally harmful activity directly at the source, and 2) by increasing the costs of environmentally destructive activity such that this activity becomes economically unviable.

⁸¹³ Graeber 2009:202 citing Rob Sparrow, ‘Anarchist Politics and Direct Action’.

⁸¹⁴ *Do or Die* 1998:143; Carter 2005:1; Coronado 2003:113.

⁸¹⁵ Jones 2004:138.

⁸¹⁶ See for example Phelps Bondaroff 2009; Phelps Bondaroff 2008; Molland 2006:51; List 1993:4. For similar definitions see Vanderheiden 2008: 301; Vanderheiden 2005:440-441; Plows, Wall and Doherty 2004:199; Letcher 2003:64; Lange 1990; Manes 1990:111 and 175; Foreman 1987:15.

⁸¹⁷ See for example Doherty, Plows and Wall 2003:679-680.

⁸¹⁸ Doherty, Plows and Wall 2003:819.

⁸¹⁹ For definitions of violence which include property destruction see *inter alia* Chenoweth and Stephan 2011:13; and Carter 2005:39; for conflicting definitions see *inter alia* Graeber 2009:177; Scarce 2006:11-12; Best and Nocella 2004:25; Rootes 2000:35-36; Cohen 1997:174; Abbey quoted by Rowell 1996:152; Foreman 1987:14; and generally see Doherty, Plows and Wall 2003:683; Ackerman and Krueger 1994:39.

⁸²⁰ Doherty, Plows and Wall 2003:683; and see Jordan 2002:68.

Rather than entreating another actor to intervene in order to stop a target from engaging in an environmentally harmful activity, DA directly intervenes. This first component of DA takes the form of denial – the act of disrupting or delaying some activity. In a domestic setting, methods such as blockades (preventing access to space), tree sitting and spiking (preventing logging), or the ‘monkeywrenching’ of extractive equipment serve this purpose. This aspect of DA is clearly evident in SSCS tactics which are designed to stop the Japanese from whaling such as prop-foulers and the blockading of the slipway of the *Nisshin Maru*, as well as the use of butyric acid to make decks unworkable or contaminate whale meat. As Potts notes, the SSCS “engages in physically blocking environmental destruction.”⁸²¹ These efforts have been successful, in so far as SSCS actions have had a significant impact in reducing the number of whales harvested through JARPA.

DA also inflicts a direct economic impact on targets through cost escalation.⁸²² Those targeted by DA may see an increase in production costs through increased security costs,⁸²³ lost wages, expensive machinery replacement, and slowed production. Companies also incur considerable indirect costs. Effective DA campaigns can dramatically increase insurance costs, as well as create “a climate of suspicion and instability among creditors and clients,” affecting the prospects of future business and investment.⁸²⁴ Bennett suggests that this strategy works along the lines of Coopman’s concept of ‘resource burn’, the process of “distracting and wearing down larger opponents who have trouble fighting such nimble distributed networks.”⁸²⁵ Some observers note that damages are insured and are likely covered by companies by passing costs on to the consumer.⁸²⁶ While in some instances this can be the case, primary industries do not have the luxury of mass consumer bases to which expenses may be passed along, and as such are particularly susceptible to this type of action. Increased insurance premiums add to costs, and a significant increase in the bottom line can harm a company’s competitiveness, as was evident in

⁸²¹ Field Journal, Potts, February 27, 2011.

⁸²² Seel and Plows 2000:126; and see *inter alia* Vanderheiden 2005:444; *Do or Die* 1998:3 and 68; Cohen 1997:70 .

⁸²³ Molland 2006:54.

⁸²⁴ Anonymous 2003:106; and see *inter alia* Best and Nocella 2004:43; Rosebraugh 2004:262; Doherty, Plows and Wall 2003:676; Manes 1990:9-10; Foreman 1987:21-22.

⁸²⁵ Bennett 2005:223 citing Coopman 2003.

⁸²⁶ Vanderheiden 2008:307.

the case of insurance premiums for whalers after SSCS actions against Norwegian whaling vessels.⁸²⁷

Most individual acts of DA lack the scale to have sufficient impact on targets to compel a change in behavior – the blockading or occupation of a single forest coupe is unlikely to bankrupt a logging company. While increasing costs is often considered a success, in order to have a dramatic impact on the operations of a target, DA must inflict considerable damage, or interfere with operations on a large scale or over an extended period of time. To this end ‘bottlenecks,’ that is, the reliance of a target on an access point or critical piece of infrastructure, are particularly susceptible to DA. In this case JARPA is particularly susceptible to DA given its reliance on a single factory vessel. Cost escalation is most assuredly part of the SSCS strategy. The SSCS regularly declares that its goal is to ‘sink the Japanese economically’ and crew members openly discuss and attempt to calculate the financial impact of SSCS actions on JARPA.⁸²⁸

6.2.4 - DA and the Media

Many scholars see DA as being oriented primarily around attracting media attention, which is portrayed as paramount to all forms of activism.⁸²⁹ Jordan notes that a “protest without media coverage is like a mime performance in the dark: possible but fairly pointless.”⁸³⁰ Even many activists see DA as being more symbolic than direct, as a “media stunt – a tactic ineffective in the absence of media coverage.”⁸³¹ This need for media coverage features heavily in the strategy of Greenpeace actions which “only receive *validation* as social realities through media coverage – without the media presence these events would be meaningless,” as Carroll and Ratner note.⁸³² Using this interpretation of DA, Greenpeace is indeed engaging in DA, however

⁸²⁷ See *supra* note 537.

⁸²⁸ See Field Journal, conversation between Burke and crew member, February 7, 2011; and Potts, February 5, 2011.

⁸²⁹ Gavin 2010:460.

⁸³⁰ Jordan 1998:327; and see Gavin 2010.

⁸³¹ Saunders 2012:838 and 840.

⁸³² Carroll and Ratner 1999:7, 10; and see Doherty, Plows and Wall 2003:675; DeLuca 1999:3; Wapner 1996.

the accomplishment of direct outcomes in this case is secondary to the creation of the image event itself.⁸³³

Here two comments can be made. First, while it is undeniable that DA's dramatic nature produces good copy,⁸³⁴ this is not the ultimate goal of DA.⁸³⁵ DA is not a form of protest, and therefore does not necessarily require an audience.⁸³⁶ Some acts of DA may be more aimed at attracting media attention, such as those of Greenpeace, but others, such as covert sabotage, involve activists avoiding publicity for their actions. Many isolated acts of sabotage go unreported, even in activist-run media.⁸³⁷ Crew members made reference to the *ad hoc* group, Agenda 21, which has sunk several whaling and fishing vessels over the past decades. The group has no spokesperson or website, and generally relies on activist media sources and issues a single press release following an action.⁸³⁸ Ultimately, as Graeber notes, "it would be possible to have a secret direct action," because regardless of the attention it receives, an act of DA still accomplishes something direct.⁸³⁹ This is evident with the SSCS, whereby it has engaged in actions for which it has sought little or no publicity, where the direct tactical goal was more important than attracting media attention.

While media attention may serve as a force multiplier in some instances, this is not always the case. As is evident in 'SSCS and the Media' (Chapter 5.3.2.7), movements do tend to benefit from media attention. In addition to mobilization, validation, and scope enlargement, DA can also use the media coverage to send "warnings to other potential targets."⁸⁴⁰ The media serves the purpose of disseminating what some activists refer to as 'threat capacity.' Groups with a reputation for engaging in highly damaging actions have a high threat capacity and may win victories without the need to act. Media coverage of actions can also further tarnish the image of

⁸³³ Steve Loper, Action Director for Greenpeace USA, interview with Durland 1987; see also Plant 2002; DeLuca 1999:1; Wapner 1996.

⁸³⁴ DeLuca and Peebles 2002; Gamson and Wolfsfeld 1993:125.

⁸³⁵ Doherty, Plows and Wall 2003:675.

⁸³⁶ See also *ibid*, p. 676.

⁸³⁷ Doherty, Plows and Wall 2003:681.

⁸³⁸ See Field Journal, January 4, 2011; SSCS, "Agenda 21 Strikes Again," April 9, 2010, available at <http://www.seashepherd.org/news-and-media/2010/04/09/agenda-21-strikes-again-211> (accessed November 3, 2013); Deep Green Resistance News Service, "Time Is Short: Twenty Years of Sabotage & Agenda 21," December 5, 2012, available at <http://dgrnewsservice.org/2012/12/05/time-is-short-twenty-years-of-sabotage-agenda-21/> (accessed November 3, 2013).

⁸³⁹ Graeber 2009:204.

⁸⁴⁰ Rosebraugh 2004:154-155.

a target, potentially increasing indirect costs and challenging their ‘social license to operate,’ and by damaging their ‘brand image.’⁸⁴¹

However not only are these benefits non-essential to DA, many argue that media attention may, at times, have a negative impact on campaigns. As discussed in the context of SSCS’s use of the media (see Chapter 5.3.2.7), coverage may be biased, can distort activists’ messages and can potentially cause or magnify backlash.⁸⁴² And as a result of activists’ goals “to directly change perceived political, social, or environmental injustices,” many reject the mediation of their messages “via political elites or the media.”⁸⁴³ It has been demonstrated that the SSCS has attempted to avoid some of this bias and backlash through its own media strategy, but that this media strategy is not central to SSCS strategy. Ultimately what can be said is that DA may benefit from media attention, but this is not its priority or ultimate goal.⁸⁴⁴

6.4 - The SSCS and Direct Action

The SSCS’s description of its own approach as ‘aggressive non-violent direct action’ appears accurate; SSCS strategy does seem to rely on many of the same mechanisms as DA. The SSCS certainly attempts to prevent Japanese whaling and to increase the costs to the whaler. The ultimate goal of the SSCS is not to attract media attention. However, observations suggest that the SSCS’s use of DA is partly but not entirely consistent with DA in the domestic context. A first suggestion might have been that the organization has simply adapted DA for use on the high seas and international affairs. While an adaptation to IR explains the SSCS’s use of international law to some degree (for example the strategic use of ‘international legal red tape’), it does not explain the organization’s insistence that it is engaged in actual law enforcement, nor the considerable measures it takes to reinforce this point. Considering the SSCS’s use of DA it becomes clear that the organization is using DA to accomplish something altogether different; that the direct outcomes it seeks to achieve through DA are intrinsic to the mechanism of its

⁸⁴¹ See for example Foreman 1987:22.

⁸⁴² Seel and Plows 2000:125; see also Gavin 2010: 470; Doherty, Plows and Wall 2007:808; Cracknell 1993:16-17.

⁸⁴³ Doherty, Plows and Wall 2003:670.

⁸⁴⁴ *Ibid*, p.675.

actual strategy. The following discussion postulates that the SSCS is using DA as part of an enforcement strategy. This strategy is explored in the following chapter.

6.4.1 - Adaptations to DA

Operating on the high seas requires more than mere tactical innovation; it considerably constrains the use of DA. Operating at sea is expensive; ships, fuel, victuals, communication and navigation equipment, registration, certification are all requisites. Even the most sophisticated land-based DA does not compare, in terms of the cost of purchasing and maintaining a vessel at sea. For instance, the *Bob Barker* was purchased at a cost of \$5 million, but the cost of purchasing a vessel is often exceeded by its maintenance and operating costs.⁸⁴⁵ The 2009-2010 campaign, during which the SSCS deployed two vessels for over three months, cost \$5.5 million, whereas the 2008-2009 campaign during which only one vessel was deployed cost \$2.3 million.⁸⁴⁶ These costs are substantial when compared to most DA actions, but compared to the operating budgets of large INGOs such as Greenpeace, they remain practically shoestring. Greenpeace for example recently unveiled the purpose-built *Rainbow Warrior III* at a reported cost of £16 million.⁸⁴⁷

One consequence of high operating costs is the need to operate above ground, in order to attract donations and support. In recent years, the SSCS has taken extensive measures to increase its visibility. *Whale Wars* has helped generate considerable revenues for the SSCS. In 2008, the tax year prior to the premier of *Whale Wars*, the SSCS received \$3.4 million in contributions; the following year contributions reached \$9.4 million.⁸⁴⁸ Growing contributions have allowed the SSCS to expand its fleet.

⁸⁴⁵ Dan Murphy, "How Bob Barker Joined Sea Shepherd Paul Watson and the Whale Wars," January 7, 2010, *Christian Science Monitor*, available at <http://www.csmonitor.com/World/Global-News/2010/0107/How-Bob-Barker-joined-Sea-Shepherd-Paul-Watson-and-the-whale-wars> (accessed December 5, 2011).

⁸⁴⁶ See *supra* note 681.

⁸⁴⁷ Greenpeace International, "The Rainbow Warrior: Meet the Ship," available at <http://www.greenpeace.org/international/en/about/ships/the-rainbow-warrior/> (accessed December 5, 2011); Bonnie Alter, "Despite a Helicopter Pad, Greenpeace's New \$23 Million *Rainbow Warrior* Ship is Greener Than Predecessors," November 14, 2011, *Treehugger.com*, available at <http://www.treehugger.com/aviation/greenpeace-new-rainbow-warrior-ship-is-greener-than-predecessors.html> (accessed December 6, 2011).

⁸⁴⁸ *Supra* note 681.

The use of covert tactics is severely limited on the high seas. While it is relatively simple for covert saboteurs to blend into an urban environment following an action, and thereby escape prosecution, it is much more challenging for activists operating from a highly visible vessel to ‘go underground.’ Maintaining a public profile is non-optional; in addition to being expensive, ships are difficult to hide, and must eventually dock to re-supply. The inability of the SSCS to rely on covert actions suggests that it must develop alternative means to avoid prosecution.

The ramifications of requiring sufficient funds to own and maintain a vessel, as well as the requirements of operating that vessel at sea have a significant impact upon the structure of the SSCS, its decision making and its leadership. The harsh reality of maritime operations demands “a well-defined command structure as found in any quasi-military operation.”⁸⁴⁹ The SSCS and all of its vessels are run hierarchically. Each vessel has a captain and officers, with Watson overseeing the majority of strategy and actions during operations.⁸⁵⁰ During the course of fieldwork, individual captains appeared to have been granted considerable autonomy in making tactical decisions. While anarchy is not a necessary feature of DA, the SSCS strict hierarchy represents somewhat of an anomaly amongst radical environmental groups, which often prefer methods such as consensus or group decision making and eschew hierarchies.

The fact that actions are conducted ship to ship, presents additional safety concerns. The use of DA against vessels can cause extensive damages. Small fleets represent ideal bottlenecks, with vessels making expensive targets, however destructive actions such as those against the *Sierra* and in Reykjavik are not possible on the high seas due to safety concerns – the risk of injury is prohibitively high. A final consideration is the need to engage skilled and potentially certified, officers and crew; a ship cannot be manned by passion alone and this ultimately serves as a further barrier to entry to the use of maritime DA.

⁸⁴⁹ Burnett 2003:248; see also Scarce 2006:97-105; Dale 1996:182; Watson 1994:9-18; Watson 1993d:78;.

⁸⁵⁰ Field Journal, December 2, 2010; and discussion of Watson’s leadership role, January 16, 2011.

6.4.2 - SSCS – *Beyond DA*

Operating on the high seas constrains the SSCS. It must organize itself in such a way as to generate revenue in order to sustain operations. Towards this end, the SSCS maintains a public and hierarchical organization, with Watson at the top. The SSCS raises funds primarily through donations from prominent donors and private citizens, and through sales of merchandise and memberships, all of which is aided by the SSCS's pirate image, dramatic actions and television program. Operating above ground obligates the SSCS to take steps in order to shield itself from prosecution, which it does by wrapping itself in 'international legal red tape.' In addition, the organization is careful that its acts appear proportional – it focuses on subverting Japanese profits rather than on causing criminal damage.

While the SSCS does use international law to shield itself from prosecution, it engages with the law in a fashion which far exceeds these requirements. As a confrontational and aggressive organization operating in the open, the need to protect itself from prosecution does not explain the organization's insistence that it is a law enforcement organization, evidenced through such actions as only targeting law breakers, collecting evidence, legal imagery and language, the WCN, etc. The SSCS is engaging in DA, but whereas most DA seeks to leverage its targets with physical and financial pressure, the SSCS appears to be using DA as a means of exerting legal leverage, in addition to these other forms. What, therefore, becomes clear is that the SSCS uses DA as a mechanism through which it directly enforces international law. The SSCS's strategy can most assuredly be seen as a form of DA, but one focused on enforcement, hence, direct enforcement (DE).

CHAPTER 7 – DIRECT ENFORCEMENT

7.1 - The SSCS and Direct Enforcement of International Law

Process tracing of the 2010-2011 campaign revealed that actively enforcing international law is central to the SSCS strategy. When the SSCS refers to itself as an international law enforcement and anti-poaching organization, it is not only doing so as a rhetorical device, but also as an expression of its strategy. The legitimacy of the SSCS's claims of acting on behalf of the WCN are highly contested, and the technical legality of a NSA enforcing the law is uncertain. However the technical legality of the SSCS's claim is not as significant as the fact that the SSCS is indeed able to make such a claim. There is some strategic advantage to be gained by claiming to enforce international law, and SSCS aggressively seeks to invoke this power. This is not to suggest that the SSCS fully understands the mechanisms which drive this power, only that the SSCS recognizes that it is provided certain advantages. Just as Wapner describes Greenpeace as disseminating ecological sensibility, the SSCS disseminates a legal sensibility.⁸⁵¹ The SSCS uses legal terminology, accuses its targets of violating the law and/or of being poachers, and will often cite the violation of specific laws in its communications.

The organization also supports its enforcement strategy through the use of legal symbols and imagery, and by enacting some procedures usually considered the preserve of law enforcement bodies, such as gathering evidence. The SSCS selects its targets with an aim to supporting its own enforcement claims, specifically selecting targets which can be accused of being in violation of the law. Just as most INGOs/TAGs gain their authority and legitimacy from their apparent moral high ground, the SSCS draws its legitimacy from its apparent legal high ground. In order to support this 'legal high ground' the SSCS must exercise restraint and proportionality. As Burbach notes, Watson's recent declaration "that he will no longer intentionally ram any Japanese whaling ships further anchors Sea Shepherd's legal authority within international conservation law."⁸⁵² Here the SSCS is avoiding tactics which may make it appear to be acting disproportionately or illegally.

⁸⁵¹ Wapner 1995:336, 322.

⁸⁵² Roeschke 2009:136.

Over the course of ‘Operation No Compromise’ the SSCS leadership made tactical decisions which, to a degree, prevented it from achieving direct operational objectives – that of preventing whaling – in exchange for broader strategic aims, notably the furtherance of the image of the SSCS as an enforcement organization. For example, as distractions and for penetrating defensive netting, the phosphorus ‘Mick Jagers’ were much more effective than the smoke variety, however, they were discontinued in so far as they appeared disproportionately aggressive, risking damage to the SSCS’s image as a proportionate law enforcement organization. Gathering evidence and investigating the legality of the fishing lines prior to their removal would be unnecessary if the SSCS were merely engaging in DA, but necessary if the organization wishes to present itself as a law enforcement organization.

This chapter will explore, in detail, how and why the ‘direct enforcement’ (DE) strategy of the SSCS works, developing the theory of DE. It begins with an overview of characteristics typical of DE, then elaborates on how this strategy differs from conventional INGO/TAG strategy, before detailing the key mechanisms of DE.

7.2 - Direct Enforcement

Removing content which is specific to the SSCS anti-whaling strategy, a discernible strategy involving claims to enforce international law emerges. This strategy can be described as ‘direct enforcement’ (DE).⁸⁵³ DE claims to enforce the law, in order to enable successful and protracted use of DA in the international arena, although its use may not necessarily be limited to the international arena. DE seeks to achieve the following outcomes: 1) to frustrate or prevent the violation of an international law; 2) to raise the material costs of non-compliance to international law; and 3) to compel states to comply with international legal frameworks, and to initiate enforcement actions of their own.⁸⁵⁴ By invoking international law, activists are also able to use DE as a shield from state prosecution, allowing them to engage in confrontational actions considered as requisite to accomplishing these outcomes. Invoking the law is also a viable means of establishing common ground and of breaking deadlocks which notably emerge around moral

⁸⁵³ The term was coined in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁸⁵⁴ See Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

issues. In appealing to the law, activists speak the language of states, revealing the failure of states to live up to their international obligations through action. Finally, by asserting their right to enforce laws, INGOs/TAGs create practices of legality around the laws they claim to enforce, thereby strengthening those laws, and simultaneously asserting and strengthening the concept that INGOs/TAGs possess the mandate to enforce the law.

Before considering these mechanisms in greater detail, it is useful to outline some features of DE and how it relates to existing understandings of INGO/TAG strategy and the role INGOs/TAGs play in IR and international law. DE can be compared to conventional INGO/TAG strategies. Conventional strategies typically seek to exert influence at all stages of the global policy-making process, by raising awareness, promulgating norms, and lobbying, or directly contributing to international negotiations, and by monitoring compliance with agreements, whereas DE focuses primarily on improving compliance through monitoring and enforcement. Unlike conventional monitoring efforts, DE does not seek to provide technical and legal assistance to states in order to enhance their capacity for compliance, or use ‘naming and shaming’ tactics in an attempt to shame actors into compliance. Instead, through DE, activists seek to enforce the law by direct intervention. DE does not constitute a form of protest. Activists using DE do not appeal to a higher authority to justify taking action. They take power into their own hands in order to bring about desired outcomes. DE does attempt to leverage states but does not rely on moral appeals. It attempts to compel states into action by articulating their failure to fulfill their international obligations, further demonstrating this failure, and undermining claims that enforcement is impossible, through action. It seems appropriate to classify DE as a more targeted form of DA rather than as a form of advocacy. While conventional INGO/TAG strategies typically disseminate technical or scientific information as a means of raising awareness or to enable policy formulation, DE relies principally on the dissemination of documentation and legal arguments as justification for direct intervention. Finally, like all INGO/TAG strategies, DE uses framing, with issues framed in narrow and often technical legal terms, rather than in moral terms. Organizations employing DE frame themselves as legitimate law enforcers empowered by a legal mandate.

INGOs/TAGs directly enforcing the law represents a departure from conventional understandings of the role of INGOs/TAGs in international law. It extends this role beyond monitoring into enforcing, with enforcing enacted without state sanction, as might be the case

with a state hiring private security companies to enforce the law on its behalf.⁸⁵⁵ Through DE, activists assert their own perceived right to enforce international law. While INGOs/TAGs have assumed increasingly prominent roles in international legal proceedings – participating in the ICJ and at advisory proceedings, during the formation of international law at most levels, as *amicus curiae*, and through private litigation and arbitration⁸⁵⁶ – these roles are typically *granted* by states. As Rubinton notes, “NGOs must be given ‘standing under general international law’, to make their voices heard and their actions felt.”⁸⁵⁷ In engaging in DE, activists do not wait to be granted standing, but seize it.

There is power in acting to enforce existing laws, but doing so is inherently a conservative exercise.⁸⁵⁸ Despite the use of ‘radical’ or controversial tactics, DE is, in fact, a relatively conservative strategy when compared to DA. DA circumvents existing power structures, and by so doing challenges, denies, or rejects them. The world envisioned by DE is one where existing (international) laws are followed and enforced by states. In enforcing existing laws and by encouraging states to do so, DE reinforces existing structures. The use of DE does not necessarily replace DA, but seeks to modify it to optimise effectiveness in the international arena. Activists can, of course, engage in DA against international targets engaged in lawful behavior – as is the case with Agenda 21 – but by so doing, they leave themselves open to prosecution and the need to rely on normative justifications, which in turn risks weakening their position. A thorough understanding of DE can add to our understanding of the ways in which INGOs/TAGs can exert direct influence in international affairs.

Perhaps the clearest distinction between DE and DA is evident in issue and target selection. Activists wishing to employ DE will select issues around an existing legal framework, where they can make a credible claim to be enforcing a law. By extension DE works effectively on targets which can be credibly framed as violating a (international) law or laws. It must be noted that this claim need not be entirely technically accurate, as in the case of Japanese ‘research’ whaling, where the legality of the actions of a target remains in question. The important point is that activists are able to make a credible claim to be defending the law, for as

⁸⁵⁵ See for example Bornick 2005:267.

⁸⁵⁶ Rubinton 1992:479-485.

⁸⁵⁷ Slaughter 2000a:135-136.

⁸⁵⁸ I am thankful to Burbach for making this point, see also Burbach 2012:19-20.

Hutchinson notes, “international relations are characterised by politics and diplomacy rather than strict and technical legalism.”⁸⁵⁹

The need for tactics to appear proportionate is accentuated in DE, as compared to DA. Not only do practitioners need to live up to ethical and pragmatic constraints upon their actions (do no harm), they must also act in a fashion considered consistent with those of law enforcement. Any law enforcement officer or agency which appears to use disproportionate force quickly loses legitimacy. This is even more the case with activists, because they lack the perceived license of the state. In appealing to the law, DE gains legitimacy by tapping into the credibility generally granted to law enforcement, the law, and the rule of law in general, but only so long as it maintains this image. This is evident in the care taken by the SSCS to appear proportionate; appearing legal and environmentally friendly are included amongst SSCS’s criteria for selecting tactics, along with direct efficacy in stopping the whalers.

DE is less affected by backlash than normative strategies or DA. More precisely, the mechanisms which make DE effective generally work regardless of backlash. SSCS actions have led to backlash, and likely to a strengthening of pro-whaling sentiment in Japan by the linkage of the issue to nationalism.⁸⁶⁰ Would that the SSCS was trying to raise awareness of whaling and to increase Japanese acceptance of anti-whaling norms, its actions would have to be considered a failure. However, one of the strengths of DE is that it is capable of accomplishing outcomes regardless of the reactions of other actors. The first two objectives of DE – stopping the illegal activity and increasing the costs of that activity – can be accomplished regardless of any backlash or the failure of legal language or attempts to leverage states. DE benefits from, but certainly does not rely on, the actions of others. Regardless of the actions of the Australian government, SSCS actions prevented Japanese whaling and increased the costs of the ICR. In addition, since the type of leverage DE exerts on states is not dependent on mobilizing popular sentiment, it is capable of acting on states regardless of widespread public awareness or support. By employing the language of states, DE speaks directly to states, and as a result, by-passes the need to communicate to the public.

It should be noted that the importance of legal framing does not mean to imply that moral attitudes and public sentiment are irrelevant to DE-based campaigns. All INGOs/TAGs rely on

⁸⁵⁹ Hutchinson 2006:7.

⁸⁶⁰ Burbach 2012:28; Hoek 2010:193; Hirata 2005:149; and see Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

public support in order to attract volunteers and in securing funding. However, moral claims remain secondary to legal claims. Although groups may simultaneously engage in DE and forms of principled advocacy, in the context of DE campaigns, normative claims tend to function as a support element, intended to aid fundraising rather than to place pressure upon governments. Similar to DA, DE does not require, but benefits from, public awareness and mobilization. Even without public knowledge, DE would still achieve results with respect to stopping its targets from acting and to increasing their costs. DE also holds the possibility of leveraging governments without widespread public awareness and mobilization.

When activists employ DE, they are invariably availing themselves of certain protections and benefits. The mechanisms which are at work when activists engage in DE are powerful, substantially more powerful than those of conventional DA. In the following sub-sections these protections and benefits will be elaborated, leading to the development of the theory of DE.

7.2.1 - DE Shields Activists

DE affords practitioners protection against potential retaliation and prosecution. The practice of engaging targets whose actions violate the law tends to shield activists from legal and political prosecution, in so far as targets have unclean hands, and do not want attention drawn to their own wrongdoings by indicting activists. Brown notes that the likely reason as to why the SSCS “has never been convicted in a court or successfully sued.... is that the vessels in question [those targeted by the SSCS] had also been engaged in criminal activities, so the owners would be reluctant to take legal action against the SSCS.”⁸⁶¹ As a result, no charges have ever been made or damages sought as a result of any of the sinkings for which the SSCS takes credit.⁸⁶² This mechanism, of targeting actors with ‘unclean hands,’ does not offer substantive protection to activists who are only targeting *norm* violators. As is explored in greater detail below, laws are less contested than norms, there being greater consequences for violating laws than there are for violating norms. Furthermore, and as is particularly the case with environmental issues such as whaling, states may find that something that violates a strong international norm may yet be

⁸⁶¹ Brown 2012:156; Khatchadourian 2007.

⁸⁶² Day 1987:56.

consistent with domestic norms. Activists run the risk of a state taking action to satisfy its core constituency over international expectations.

Despite these protections, if states wished, they could take individual or collective measures to shut down groups engaged in DE.⁸⁶³ The continued practice of DE activism thus depends on a degree of complicity with governments that support stricter enforcement of environmental measures.⁸⁶⁴ In as much as the application of international law is costly, pro-conservationist governments may judge that the benefits from third party enforcement are sufficient and, as a result, turn a blind eye to vigilantism or even lend tacit support to such practices, as argued by Moffa.⁸⁶⁵ This is evidenced in the Australian government's treatment of the SSCS, whereby it allows the organization to operate from its ports, and when obliged, performs a perfunctory investigation of the organization. In addition, by invoking and applying international law, activists place moral and political pressure on pro-conservationist governments to increase their own enforcement efforts, and may provide these actors with justifiable reasons for further actions which might have otherwise lacked political expediency.

By shielding activists from prosecution, DE enables activists to confront illegal activity, thereby stopping that activity, or increasing costs to targets, and creating situations which exert leverage against states. Confrontational actions which might otherwise be seen as illegal are re-framed as components of enforcement actions, and thereby justified, while the actions of targets are framed as law breaking, and therefore deserving of enforcement action. It appears as though the SSCS has turned its focus to illegal operations after learning from previous attempts to target legal operations met with limited success; for example the confiscation of the *Farley Mowat* by the RCMP in 2008 while targeting the legal Canadian seal hunt, and the interception of *Whales Forever* by the Norwegian cutter *Andenes* in 1992.

⁸⁶³ Moffa 2012.

⁸⁶⁴ Thanks to an anonymous reviewer of Eilstrup-Sangiovanni and Phelps Bondaroff 2014, for suggesting this phrasing.

⁸⁶⁵ Moffa 2012:211.

7.2.2 - *The Power of the Law*

The primary currency of INGOs/TAGs is typically seen to be norms. INGOs/TAGs generally take the role of moral actors, drawing their authority from the moral high ground, propagating norms in the international community, shaming norm-violators and so on. Norm entrepreneurs face challenges when seeking to introduce new norms, or in grafting new interpretations and frames onto existing norms, or in attempting to forge consensus on an issue. DE represents a form of framing, whereby issues and practitioners are framed as legal rather than normative. Making an appeal to existing laws can be more powerful than appealing to norms. As Abbott and Snidal note, “...legalization provides actors with a means to instantiate normative values.”⁸⁶⁶ Laws ultimately represent a codification of shared understandings – norms. Laws are perceived as powerful and legal arguments as persuasive, because they are grounded in the norms of a society – the shared understandings of that society.⁸⁶⁷ Legal arguments are persuasive because of the association of law with these criteria of legality, and because there is generally support for the rule of law.

Appealing to international law invokes belief in the rule of law—a principle that tends to enjoy universal support among political authorities as opposed to moral principles which can be contested. As Fuller and Nardin argue, a commitment to law and the rule of law does “not require fundamental shared commitments to a single political morality, nor the existence of centralized political authority.”⁸⁶⁸ This is of particular importance with respect to international environmental issues. As discussed, many environmental issues are characterized by clashes between competing principles or claims – protecting habitat versus economic development, or conservation versus cultural practices. Environmental issues tend to be complicated: they do not directly involve bodily harm to individuals or groups, or clearly violate principles of legal equality of opportunity; they do not have short and clear causal chains. Many environmental issues are difficult to frame as “protecting the often vulnerable people who live in [the ecosystem],”⁸⁶⁹ and may lack available charismatic fauna. Environmental claims based on appeals to shared norms and values also carry a substantial risk of back-firing when effective

⁸⁶⁶ Abbott and Snidal 2000:422.

⁸⁶⁷ Finnemore and Sikkink 1998:914-915.

⁸⁶⁸ Brunnée and Toope 2010:21, quoting Fuller. For a similar argument see also Nardin 1998:31.

⁸⁶⁹ Keck and Sikkink 1998:27.

counter-claims are made by groups whose socio-economic and cultural interests may be threatened.⁸⁷⁰ This is evident in the Japanese reply to criticism of its whaling program, when it claims that whaling is an intrinsic part of its culture and that eating whale is no different than eating cow. The existence of opposing norms can often lead to moral and political impasses, resulting in inaction on the part of governments not wishing to appear biased towards rival domestic constituencies. Governments may even side with norms opposing environmental claims, particularly when such claims represent the material interests of a targeted constituency, as compared to transnational environmental claims. The annunciation of a legal principle, can often serve to transcend a moral standoff, and compel states to act.

All these components are in play in the whaling issue: opposing pro- and anti-whaling norms have forced the IWC to a standstill. The long-time anti-whaling US has been forced to weaken its stance in order to obtain IWC approval for its aboriginal whaling quotas. In Japan, a clear example of a state favouring domestic interests over transnational ones is evident. The government's staunch pro-whaling position is presented as strength in the face of *gaiatsu*.⁸⁷¹ Normative arguments simply do not resonate in Japan, where whales are generally considered as fish. At best these arguments fall on deaf ears, and at worst they are perceived as cultural imperialism, effectively strengthening pro-whaling sentiment by making it into a cultural issue. Continuing to pursue normative arguments is unlikely to change this state of affairs, and it is precisely this kind of situation where legal arguments offer a potential solution.

The power of laws over norms is evident in the efforts pro-whaling states have undertaken in an attempt to overturn the moratorium on commercial whaling through the introduction of the Revised Management Procedures (RMP), as well as through efforts made by the Japanese, such as emblazoning the word 'Research' on the sides of their vessels, to frame their actions as 'research,' and therefore legal under the ICRW.

Using DE, activists can engage in jurisdictional arbitrage, framing their actions as enforcing laws selected specifically to suit their cause or desired course of action. This has the effect of expanding the breadth of arguments, frames, targets and issues, and of thus increasing opportunities for success. Using DE does not preclude the use of normative approaches by a movement or organization. The presence of DE within the repertoire of a movement helps to

⁸⁷⁰ *Ibid*, 121; and see Bratman 2012.

⁸⁷¹ Foreign pressure, see *supra* note 501.

strengthen that movement by expanding the spectrum of its actions and critique, as well as by allowing a movement to circumvent normative impasses. The SSCS uses a variety of arguments against whaling, using DE and speaking primarily to states when critiquing JARPA for violating international and Australian domestic law, while appealing to animal rights supporters by highlighting the cruelty of the hunt, and to environmental supporters by criticizing the hunt's impact on threatened species.

7.2.3 - The Power of DE Over States

Law matters in IR. Brunée and Toope argue, that “[i]f law were nothing more than enforcement by self-interested states, the very concept would not be needed. Power would do its own work.”⁸⁷² But laws do matter and have their own power, and DE taps into this power: by claiming to enforce international laws where governments fail, activists can succeed in leveraging powerful political actors. This kind of leverage was evident in the SSCS's use of DE, particularly with respect to Australia and to a lesser extent Chile.

DE ultimately speaks the language of states, and while the primary target of normative claims are the public or international civil society, the primary audience of DE is states. Whereas normative claims may be directed at policy-makers in order to change their perceptions of an issue, the chief aim of principled advocacy is to mobilize public sentiment in favour of policy change, thereby bringing indirect pressure to bear on governments. The primary targets of the legal framing of DE are governments. To borrow from Mégret, DE is “fundamentally challenging the state's behavior [sic] from the point of view of its own international obligations.”⁸⁷³ The state is the source of law (domestically and internationally), and “[a]t the most foundational level, states govern through legal means that are supported by the threat or use of force.”⁸⁷⁴ Fundamental to the legitimacy of the international legal regime is “the ability of nations to make reciprocal commitments, trusting that such agreements will be upheld” (*pacta sunt servanda*).⁸⁷⁵ In our relatively anarchic international system, states have difficulty “credibly

⁸⁷² Brunnée and Toope 2010:5.

⁸⁷³ Mégret 2008:19-20.

⁸⁷⁴ Wapner 1995:337.

⁸⁷⁵ Moffa 2012:212; see also Abbott and Snidal 2000:428, citing Franck 1990.

committing themselves to future behavior [sic],”⁸⁷⁶ and as such governments are alert to claims that they or their partners are failing to abide by agreements.⁸⁷⁷

Abbott and Snidal note that “[l]egalization is one of the principal methods by which states can increase the credibility of their commitments.”⁸⁷⁸ Laws are created with the expectation that they will be upheld, and the reputation of a state for compliance has tangible political and economic consequences.⁸⁷⁹ The importance of appearing to act in accordance with (international) law is such that states will go to lengths to seek legal justification for violations. An example is the efforts which the US undertook to justify the legality of its invasion of Iraq.⁸⁸⁰ States may feel ‘shame’ when they are named as norm violators, but DE calls into question the very legitimacy of a state as an international actor – one capable of upholding its international agreements or enforcing laws within its jurisdiction.

When Watson declares that “all Australians should expect the Australian Government to enforce the law”, he is not appealing to the ecological sentiment of Australian citizens—rather he is appealing to the government’s credibility as an authority capable of making and enforcing laws on behalf of its citizens.⁸⁸¹ The SSCS is shaming the Australian government for its failure to uphold its sovereignty, its most basic claim to statehood. The SSCS is not claiming that Australia is normatively ‘bad’; it is reminding them that they have failed to enforce their most basic obligations as a state. Watson’s most repeated phrase, that “[w]e have all the laws we need to stop the slaughter of whales but we lack the political and economic will on the part of governments to enforce the laws”, is an indictment of states’ commitment to the principle of *pacta sunt servanda*.⁸⁸²

Rhetoric in and of itself may be insufficient to compel a state into action. It takes very little effort to simply call into question the legitimacy of a state through a press release. What makes DE effective, and differentiates it from naming and shaming, is that it supports this

⁸⁷⁶ Abbott and Snidal 2000:426.

⁸⁷⁷ See also Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁸⁷⁸ *Ibid.* and 428.

⁸⁷⁹ Burgerman 2001:8.

⁸⁸⁰ See for example Strachan 2005:48.

⁸⁸¹ Watson quoted by News.com.au, “Arrest the Whalers, Activist Demands,” October 21, 2009, available at <http://www.news.com.au/breaking-news/national/arrest-the-whalers-activist-demands/story-e6frku9-1225789454255> (accessed August 6, 2013).

⁸⁸² Treehugger.com, “Anti-Whaling Warrior, Captain Paul Watson,” November 5, 2008 available at <http://www.treehugger.com/about-treehugger/anti-whaling-warrior-captain-paul-watson.html> (accessed November 7, 2013).

rhetoric with DA. By backing claims of non-compliance with (confrontational) actions, DE attempts to compel states to change their default policy on an issue (that of having no policy), or to change an existing policy from one which permits the violation of international law, to one where the law is enforced. DE need not do so through the manufacture of international incidents, although these occurrences do level acute pressure on states, often compelling rapid policy formation/alteration. The act of enforcing the law, in the absence of state enforcement, can be sufficiently powerful, producing a persistent form of pressure on states. By engaging in DE, activists set themselves up as an example of the failures of states, goading states into action, by declaring ‘if we as a small resource poor NGO can do it, why can’t you as a state?’ The fact that an INGO/TAG can effectively enforce compliance trumps arguments that enforcement is impractical or impossible, further removing hurdles which would otherwise provide justification for non-intervention by states. By speaking the language of law and sovereignty, DE addresses states directly, ensuring that this message is heard through (confrontational) DA. In this fashion DE is a form of DA, with the application of DA as central to DE. DE represents an optimized method of employing DA in the international arena.

7.2.4 - DE as Interactional Law

INGOs/TAGs engaging in DE can have a broader influence upon international law and indeed implement international laws themselves. In enforcing laws which have poor compliance, activists seek to strengthen the compliance pull – the ability of a law to promote adherence or to inspire fidelity – of these laws. In asserting a right to enforce international laws, activists are ultimately seeking to reinforce the assertion that they have a *right* to enforce international law. In order to understand these mechanisms, it is useful to examine DE through Brunnée and Toppe’s interactional theory of legal obligation. These scholars argue that laws are “generated and maintained through social interaction.”⁸⁸³ They extend upon the work of Fuller, describing three criteria which create strong legal norms:

First norms can only arise in the context of social norms based on shared understandings. Second, internal features of law, which we call criteria of legality, are crucial to law’s ability to promote adherence, or to inspire ‘fidelity’. Third,

⁸⁸³ Emphasis original, Brunnée and Toope 2010:64.

legal norms are built, maintained, and sometimes destroyed through a continuing practice of legality.⁸⁸⁴

A law may meet all of Fuller's criteria of legality and be congruent with shared understandings, yet still fail to inspire fidelity, becoming 'dead letter.'⁸⁸⁵ An integral part of strengthening the compliance pull of a rule is through practices of legality – interactions – surrounding that rule. Brunnée and Toope insist that "law does not exist merely because legal norms are declared"⁸⁸⁶, suggesting that "[i]f norms are to prevail and maintain compliance pull, they must be reasserted again and again."⁸⁸⁷

Using Brunnée and Toope's framework, DE can be conceived as a *practice of legality*—an assertion of legal norms designed to enhance their compliance pull. INGOs/TAGs using DE do so as part of what Brunnée and Toope label a *community of practice* – a group of actors (consisting of states and NSAs) that "make, maintain and remake international law."⁸⁸⁸ In the face of non-compliance, "the efforts of such actors to reassert shared norms play a crucial role in upholding international legality, and in drawing delinquent actors back towards compliance."⁸⁸⁹ Delinquents are not forced into compliance, but as practices of legality surrounding a particular law increase, so does the compliance pull of that law. Non-compliance becomes more obvious and a more pressing issue in the face of continued efforts at enforcement and greater compliance. Gradually a situation where non-compliance may have been commonplace transforms to one where it is exceptional, and the pressure on delinquents increases, making them more likely to comply.⁸⁹⁰ The creation of practices of legality around an otherwise dead letter law is crucial to making that law matter. Laws become dead letter and ineffectual when they are not followed, but also when there are no practices of legality surrounding them – efforts to follow the law, efforts at enforcements, and recognitions of violation in the event of non-compliance.

This is particularly applicable with respect to international conservation laws, such as the SOWS, which exert modest to weak compliance pull. These laws lack strong enforcement measures, monitoring, and other state-driven practices of legality. In this absence, NSAs

⁸⁸⁴ *Ibid.*, p.15.

⁸⁸⁵ For Fuller's criteria of legality see Brunnée and Toope 2010:6, quoting Lon Fuller, *The Morality of Law*, 46-90.

⁸⁸⁶ *Ibid.*, p.352.

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *Ibid.*

⁸⁸⁹ *Ibid.*

⁸⁹⁰ *Ibid.*, and p.33.

intervene in order to foster practices of legality through their own initiative. When the SSCS uses DE to enforce the SOWS and the commercial whaling moratorium, it is contributing to the practices of legality surrounding these regimes and thereby strengthening the compliance pull of these regimes.

Here one might object and argue that DE activism cannot plausibly be construed as a practice of legality insofar as activists may violate the law through their enforcement actions.⁸⁹¹ Several points can be made in response. DE, arguably, has a precedent in domestic laws that allow citizens to undertake arrests in order to prevent a crime.⁸⁹² Domestic law in many countries regard acts of ‘citizen’s arrest’ as defensible, provided they adhere to principles of ‘just cause’ (which suggests that there must be reasonable grounds to believe that an arrest is necessary in order to prevent a crime) and ‘proportionality.’⁸⁹³ As has been noted, doctrines of just cause and of proportionality play a prominent role in DE strategizing and rhetoric. Furthermore, the laws around which DE fosters interactions are not the same laws which activists might violate through confrontational action. The SSCS seeks to enforce international conservation law, with its actions seeking to create a practice of legality around these conservation laws. If this practice of legality violates other legal norms, such as SUA or the IRPCS, it does not adversely affect the practice of legality in which the SSCS is engaged, particularly if the SSCS keeps its actions proportionate, which, it goes to considerable length to do. Brunnée and Toope postulate that “[l]egal obligation can exist even in the face of contrary practice [although] widespread failure to uphold the law as formally enunciated leads to a sense of hypocrisy which undermines fidelity to law, and may ultimately destroy the posited rule.”⁸⁹⁴ It is unlikely that potential minor violations of the IRPCS on the part of the SSCS threaten the compliance pull of these regulations, but it is possible that the SSCS’s enforcement of the SOWS or of the commercial whaling moratorium may strengthen the compliance pull of these laws. Finally, it is entirely possible that an enforcement action could be carried out without violating any laws or regulations. Unlike Mégret’s CD as a form of law enforcement, violation of the law by activists is incidental, not central to the strategy of DE.

⁸⁹¹ Moffa 2011. Thanks to an anonymous reviewer of Eilstrup-Sangiovanni and Phelps Bondaroff 2014 for raising this objection.

⁸⁹² Anton 2010a.

⁸⁹³ *Ibid.*

⁸⁹⁴ Brunnée and Toope 2010: 232.

It should be noted, that this remains true for hard and soft law. Legal scholars often distinguish between hard and soft law. Hard law is used to refer to “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”⁸⁹⁵ Soft law has been described as ‘non-treaty agreements’⁸⁹⁶ and as “non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations... to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.”⁸⁹⁷ DE can endeavour to enforce either soft or hard law, although efforts to enforce hard law are likely to prove more fruitful, given the clarity of hard law and the fact that it is generally perceived as more binding than soft law.

The practice of engaging in DE is also a form of norm entrepreneurship. When activists labour to enforce an international law, they are not only increasing the compliance pull of that law by contributing to the practices of legality surrounding it, they are also asserting another norm; their right to enforce the law. By acting to enforce international laws, activists are attempting to alter the shared understanding of the role of INGOs/TAGs, in order that INGOs/TAGs are understood as empowered to enforce the law. The act of an INGO/TAG enforcing a law, any law, has the effect of creating a ‘practice of legality’ around the norm that activists are empowered to enforce international laws. To adapt Mégret, the direct enforcement of international law, “manifests an aspiration by individuals to behave as citizens of the world and take international law seriously.”⁸⁹⁸ Activists project an idealistic interpretation of international law where individuals can act to uphold the law, not only proposing it theoretically, but by enacting it. Activists are assuming a place within a community of practice. The effect of this is that DE practitioners are not only asserting that their actions are meaningful to the practices of legality within that community, but acting upon these assertions, which has the effect of making them part of that particular community of practice – part of reality. In claiming that its actions are mandated by the WCN, the SSCS is contributing its own interpretation to the practices of legality that surround the WCN, asserting that sections 21 and 24 are a mandate for DE. The more interactions the SSCS generates around this interpretation, the more the

⁸⁹⁵ Abbott and Snidal 2000:421.

⁸⁹⁶ Hillgenberg 1999.

⁸⁹⁷ Chinkin 1989:851.

⁸⁹⁸ Mégret 2008:16.

interpretation is reinforced and becomes part of shared understandings of the role of INGOs/TAGs in IR.

CHAPTER 8 – ISSUE SELECTION AND DIRECT ENFORCEMENT IN OTHER CAMPAIGNS

8.1 - DE Beyond Anti-Whaling

Conceptualizing SSCS strategy as DE serves to explain SSCS actions and the mechanisms which make them effective. An analysis of the history of SSCS anti-whaling actions reveals some of the learning process which resulted in the development of DE applied to the Antarctic anti-whaling campaign. In its earlier campaigns, the SSCS employed DA against both legal and illegal targets, and used explosives and intentional rammings. The SSCS has moderated its approach, eschewing rammings and the use of explosives and has focused its actions against targets which can be claimed to be in violation of the law. The SSCS also avoids engaging in confrontational actions within state jurisdictions, in an endeavor to avoid intervention by state authorities, such as the *Farley Mowat* ship confiscation incident or the *Whales Forever/Andenes* incident. The organization has refined DE during the course of its Antarctic anti-whaling operations, experimenting with various tactics, adding elements of ‘enforcement and legal symbolism’ to its vessels (for example the use of uniforms for the crew and the removal of the ‘rammed’ category from the ships’ kill flags). Much of the SSCS’s past experience has contributed to the development of DE. There are two questions not resolved by studying the SSCS Antarctic anti-whaling strategy, a) questions of issue selection, and b) whether DE is unique to the anti-whaling campaign.

The SSCS anti-whaling campaign serves as an excellent case study for the understanding of SSCS strategy, but is not as well suited to examining questions of issue selection. In spite of a consideration of the Antarctic anti-whaling campaign since its inception, it remains unclear whether DE was developed as an optimal strategy following issue selection, or whether the issue was selected due to the existence of favourable legal frameworks. As we have seen, whaling has long been an issue central to the SSCS; likewise, whales are popular and generally considered as charismatic fauna, making them good flagship species. In order to give consideration to issue selection, it is therefore useful to examine a campaign which was initiated well after the SSCS’s development of DE on the anti-whaling campaign. Towards this end, the SSCS’s bluefin tuna

campaign serves as a useful supplementary case study. As Burke noted, the bluefin tuna campaign represents the SSCS ‘testing the waters’ for future campaigns, apparently experimenting with the use of more DE-oriented campaigns.⁸⁹⁹

An examination of the SSCS bluefin tuna campaign also serves another purpose. The goal of studying SSCS anti-whaling strategy was not to develop an idiosyncratic description of this strategy, but was to further our understanding of how NSAs can exert influence in international affairs. Determining whether or not the SSCS applies DE to any of its other campaigns can help clarify whether this strategy is specific to the nuances of the whaling issue. While legal frameworks favourable to DE exist around Antarctic whaling, the issue also has other features which make it well suited to INGO/TAG campaigning in general. Whales are charismatic, making them well suited to serve as flagship species, and the anti-whaling norm has been widely proliferated. Operations occur in a remote area, relies on a single factory ship (bottleneck) and the Japanese whaling industry, despite the government support it receives, is small. Using the SSCS anti-whaling campaign as a case study serves to identify DE, but a separation of DE from the whaling issue is necessary in order to ascertain that DE is not unique to the issue.

Study of the SSCS strategy in its bluefin tuna campaign indicates that DE is not unique to the whaling issue. Scrutiny of this campaign, reveals learning on the part of the SSCS and that the SSCS has indeed focused more specifically on legal claims and enforcement.⁹⁰⁰ The bluefin tuna issue is bereft of any of the notably favourable characteristics present in the whaling issue. The SSCS having adopted this issue despite its apparent shortcomings suggests that issue selection was motivated, at least in part, by the existence of legal frameworks favourable to DE. Comparing the SSCS’s use of DE on the bluefin tuna campaign with approaches taken by organizations such as Greenpeace, which employed DA on the same issue, serves to illustrate how DE differs from other INGO/TAG strategies.

After examining the SSCS’s use of DE in its bluefin tuna campaign, this chapter concludes with a survey of other NSAs which employ DE in order to establish that DE is not an idiosyncrasy of the SSCS, but can be employed by a range of actors across a range of issues.

⁸⁹⁹ Field Journal, Burke, February 14, 2011.

⁹⁰⁰ For a detailed discussion of learning see Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

Towards this end, the use of DE by other marine and land-based conservation groups and the use of DE on other, non-conservation related campaigns is explored.

8.2 - DE in Other SSCS Campaigns – Blue Fin Tuna

8.2.1 - Background and Conventional INGO/TAG Efforts

Overfishing is a serious problem, with fish populations in decline worldwide. Chief amongst the species currently threatened is the bluefin tuna. Scarcity and high demand has led to soaring prices: the average price for a mature tuna is now over \$75,000, and record-breaking prices are set each year for particularly large specimens.⁹⁰¹ This tends to provide incentive for overfishing, both legal fishing under government quotas and illegal, unreported, and unregulated fishing (IUU). As a result, scientists now believe bluefin tuna may be commercially extinct in the Mediterranean Sea in fewer than 5 years.⁹⁰² Although the problem is widely recognized, intergovernmental efforts to address the issue have been hampered by a combination of poor enforcement capabilities and lack of political will.⁹⁰³

The main body responsible for the management of Atlantic tuna is the International Commission for the Conservation of Atlantic Tunas (ICCAT). Created in 1972, ICCAT is charged with the conservation of tuna in the Atlantic Ocean and adjacent seas, but has proven incapable of stopping IUU fishing. Member states have repeatedly failed to reduce official catch limits, as recommended by the ICCAT Standing Committee on Research and Statistics, and ICCAT resolutions to curb IUU fishing having been widely disobeyed.⁹⁰⁴ Similar to the IWC and other conservation regimes, ICCAT lacks concrete enforcement measures and economic

⁹⁰¹ The Telegraph, “Bluefin Tuna Sells For Record-Breaking \$1.8 Million,” January 5, 2013, available at <http://www.telegraph.co.uk/news/worldnews/asia/japan/9782074/Bluefin-tuna-sells-for-record-1-million.html> (accessed November 8, 2013).

⁹⁰² Scheiber et al. 2008.

⁹⁰³ See Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁹⁰⁴ Steven Adolf, “Bluefin Ban Rejected,” *Ncr.nl*, September 25, 2009, available at http://vorige.nrc.nl/international/article2369672.ece/Bluefin_tuna_ban_rejected (accessed May 16, 2012); Anna-Marie Lever, “US Wants Freeze on Tuna Fishing,” *BBC News*, November 16, 2007, available at <http://news.bbc.co.uk/1/hi/sci/tech/7097311.stm> (accessed May 16, 2012); See Economist, “Fin Times,” March 18, 2010, available at <http://www.economist.com/node/15720346> (accessed September 17, 2013); Scheiber et al. 2008:120; and see Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

interests appear to outweigh conservation issues.⁹⁰⁵ In addition to ICCAT regulations, bluefin tuna fisheries in the Mediterranean are also regulated by the European Commission, which has incorporated ICCAT quotas and regulations into the European common fisheries policy (CFP).⁹⁰⁶ The Commission is in charge of testing national inspection systems to ensure that they effectively comply with regulations, however it only employs 25 inspectors who are capable of conducting 130 inspections per year.⁹⁰⁷ ICCAT employs no independent inspectors, relying instead on those of contracting governments.⁹⁰⁸ Due to these meager efforts, tuna populations continue to drop.

The challenges faced by campaigners on the bluefin tuna issue are synonymous with those inherent to many environmental issues. Tuna lack key attributes, such as clear resonance with existing international norms, to make them amenable to conventional advocacy strategies.⁹⁰⁹ Similarly, the issue lacks a clear human dimension, a clear causal chain, particularly potent or symbolic cases, and clear identifiable perpetrators to be held to account.⁹¹⁰ One way in which environmental campaigners have sought to overcome these problems, is through the use of a flagship species, however bluefin tuna, unlike whales, lack the requisite charismatic features. The WWF implicitly made this point when it ran an advertisement campaign featuring images of bluefin tuna wearing a panda mask, with the caption “Would You Care More if I Was a Panda?”⁹¹¹ Few conservation groups have attempted to mobilize public opinion on the issue, and instead have focused on lobbying policy-makers, and on monitoring and enforcing existing fisheries regulations.

Since 2009 a number of INGOs/TAGs have sought to address the problem through a range of strategies. Conventional lobbying strategies were used, with organizations such as Oceana, the PEW Environment Group, WWF and Greenpeace providing information and technical advice to delegates in an effort to convince ICCAT to adopt tougher regulations and

⁹⁰⁵ Grescoe 2009:254.

⁹⁰⁶ European Commission 2009.

⁹⁰⁷ *Ibid.*, p. 21.

⁹⁰⁸ ICCAT, “ICCAT Joint Scheme of International Inspection,” available at <http://www.iccat.es/en/Inspection.htm> (accessed September 16, 2013).

⁹⁰⁹ See Keck and Sikkink 1999:98; and see Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁹¹⁰ Eilstrup-Sangiovanni and Phelps Bondaroff 2014; Nelson 2002b:385; and see Burgerman 2001:45.

⁹¹¹ Design Scene, *WWF Bluefin Tuna Overfishing: Rhino* [Online Image], 2011, available at <http://www.designscene.net/wp-content/uploads/2011/03/WWF-Bluefin-Tuna-Overfishing-DESIGNSCENE-net-01.jpg>. (accessed January 23, 2013); and see Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

smaller quotas.⁹¹² When these efforts were unsuccessful, INGOs/TAGs turned their attention to CITES. Similar strategies were employed within CITES, and as a result, it was widely expected that bluefin tuna would be included in Annex I of CITES, which would have banned trade in this species, however, the motion failed.⁹¹³

8.2.2 - DE and Bluefin Tuna

While bluefin tuna may lack characteristics which make them favourable to conventional INGO/TAG strategies, the bluefin tuna issue does have characteristics which invite the use of DE, specifically the existence of regulatory framework, in the form of ICCAT quotas and the CFP. In 2010, both the SSCS and Greenpeace sent vessels to the Mediterranean to document IUU fishing and to harass fishing boats.⁹¹⁴ The SSCS employed a distinctly DE strategy, while Greenpeace's approach can be more accurately described as symbolic politics and DA. In May 2010, Greenpeace deployed the *Rainbow Warrior* and *Arctic Sunrise* to blockade the French port of Frontignan. Greenpeace called for an "immediate closure of the Mediterranean bluefin fishery...until scientists can verify that the species has recovered."⁹¹⁵ In doing so, Greenpeace was seeking to draw attention to the issue of bluefin tuna overfishing, and to prevent fishing from occurring. Since Greenpeace instituted the blockade before annual quotas had been reached, many of the boats targeted were engaged in legal fishing, prompting the European Commission for Maritime Affairs and Fisheries to condemn the blockade, and relegating the strategy into the category of image politics and DA.⁹¹⁶ Later in the campaign, two Greenpeace

⁹¹² PEW, "Joint Policy Statement on Atlantic Bluefin Tuna Management," *Pew Charitable Trusts*, November 16, 2010, available at <http://www.pewenvironment.org/news-room/press-releases/joint-policy-statement-on-atlantic-bluefin-tuna-management-8589935407> (accessed January 23, 2013).

⁹¹³ David Adam, "Bluefin Tuna Fails to Make UN's List of Protected Fish," *Guardian*, March 18, 2010, available at <http://www.theguardian.com/environment/2010/mar/18/bluefin-tuna-un-cites> (accessed September 17, 2013).

⁹¹⁴ Field Journal, conversation comparing SSCS and Greenpeace bluefin tuna strategies, with Stokes, December 5, 2010.

⁹¹⁵ Greenpeace France, "Thon rouge: Greenpeace s'interpose pour empêcher le pillage de l'espèce," May 12, 2012, available at <http://presse.greenpeace.fr/oceans/thon-rouge-greenpeace-sinterpose-pour-empecher-le-pillage-de-lespece-2620-12052010> (accessed September 17, 2013).

⁹¹⁶ Times of Malta, "Greenpeace Campaign to Halt Bluefin Tuna Fishing," May 15, 2010, available at <http://www.timesofmalta.com/articles/view/20100515/local/greenpeace-campaignto-halt-bluefin-tuna-fishing.307411> (accessed 16-05-2012).

RIBs were sunk and an activist struck with a boat hook, after French fishermen, fishing legally, reacted violently to efforts to release their catch.⁹¹⁷ A Greenpeace blog entry described how

in the middle of the melee I was talking on radio to a patrolling French warship, there to monitor the fishery. They called us to read out a pre-prepared script about how ICCAT had everything under control, and they were monitoring the fishery closely. When I explained we were taking action precisely because ICCAT had not done enough their response was to ask us not to interfere with the fishing operations because they were legal. To that I simply replied that it didn't matter if the fishery was legal, if it was pushing the species towards extinction and that we would continue to take action to stop the purse seining...⁹¹⁸

The limitations of DA in this context are clear; the French could not be leveraged into taking action, because, as the blogger notes, Greenpeace was targeting legal operations.

The SSCS, by contrast, adopted an approach which was consistent with DE, only targeting unregistered vessels and those which continued to fish after the close of the season, and/or after their nation had exceeded its allotted quota. A SSCS press release from 2010 highlights the campaign's enforcement focus and draws a clear distinction between and DE and the approach adopted by Greenpeace:

SSCS does not believe that publicity stunts and harassment of legal fishing operations is the answer to the problem of saving the bluefin tuna from extinction... we did not come to the Mediterranean to hang banners and protest. Our job is to investigate, identify, and intervene against illegal fishing operations... We are an anti-poaching organization and not a protest group.⁹¹⁹

As this quote attests, throughout its campaign to protect bluefin tuna, SSCS has taken great care to portray itself as acting in defense of international law. Watson articulated the strategy of the SSCS bluefin tuna campaign, noting that

[i]t is a strategic choice to target only the poachers. It is more difficult and more dangerous, but more effective. I don't really see the benefit of blocking a perfectly legal fishing vessel from leaving port for a few hours, which will in any case leave to go fishing as planned, with fishers aboard who are a little more upset with

⁹¹⁷ Greenpeace International, "Greenpeace Boats Sunk as Environmentalists Attempt to Save Endangered Bluefin Tuna," June 4, 2010, available at <http://www.greenpeace.org.uk/media/press-releases/greenpeace-boats-sunk-environmentalists-attempt-save-endangered-bluefin-tuna-20100604> (accessed August 22, 2013).

⁹¹⁸ Juliette H., "Taking Action, and Taking Blows, For Bluefin," *Greenpeace International*, Blogs, June 4, 2010, available at <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/taking-action-and-taking-blows-for-bluefin/blog/12002/> (accessed August 22, 2013).

⁹¹⁹ SSCS, "Sea Shepherd to Focus On Responsible Intervention Against Bluefin Tuna Poachers," May 17, 2010, available at <http://www.seashepherd.org/news-and-media/2010/05/17/sea-shepherd-tofocus-on-responsible-intervention-against-bluefin-tuna-poachers-196> (accessed 16-05-2012).

‘environmentalists.’ We are interested in concrete results. Destructive but legal fishing must be fought on legal grounds. At sea, we fight the poachers because they are the ones we are in a position to stop.”⁹²⁰

This statement makes it clear the desired intent of DE to avoid backlash by deflecting potential ill will towards the law and not the activists, and includes clear criticism of Greenpeace’s approach.⁹²¹

The SSCS sent several ships to the Mediterranean to document illegal fishing practices. However, activists did not engage or harass fishing vessels until the European Commission for Maritime Affairs and Fisheries announced on June 9, 2010 that the official annual tuna quota had been reached. Only at this point did the SSCS target fishing boats which continued to operate. On June 17, 2010, the *Steve Irwin* challenged the *Cesare Rustico*, an Italian vessel towing two cages containing bluefin tuna. After notifying ICCAT of a possible violation to fisheries laws and receiving no response, five SSCS divers entered the cages and cut the nets, releasing an estimated 800 tons of fish back into the sea.⁹²² Following this action, the SSCS was sued by Fish & Fish, the owners of the damaged fishing equipment. The court case was resolved on June 25th 2012, when it was dismissed from a UK court when the justice determined that the court was not the proper place to hear the case. While the principle of unclean hands did not shield the SSCS from legal attack in this case, the complicated legal issues surrounding the incident involving the *Cesare Rustico* – the fact that the Italian owners of a vessel, fishing in Maltese waters, claimed damages from a Dutch registered vessel, owned by SSCS UK, operated by an INGO, and captained by a Canadian, would reinforce inappropriateness of seeking redress through a UK court.⁹²³

What the bluefin tuna case study does illustrate is that the SSCS has made DE central to its strategy, and that its language is focused on enforcement and the law. Conservation

⁹²⁰ Watson quoted by Essemli with Watson 2013:74.

⁹²¹ See Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁹²² John Vidal, “Sea Shepherd Activists Free Hundreds of Threatened Bluefin Tuna Off Libya,” *Guardian*, June 18, 2010, available at <http://www.guardian.co.uk/environment/2010/jun/18/seashepherd-release-bluefin-tuna-libya> (accessed 16-05-2012); and see SSCS, “Sea Shepherd Frees 800 Bluefin from Floating Cages Below Libya’s Infamous Line of Death.” June 17, 2010, available at <http://www.seashepherd.org/news-and-media/2010/06/17/sea-shepherd-frees-800-bluefin-fromfloating-cages-below-libyas-infamous-line-of-death-174> (accessed 16-05-2012).

⁹²³ The Incorporated Council of Law Reporting for England and Wales, *Fish & Fish Ltd v Sea Shepherd UK and others*, (2013) EWCA Civ 544; (2013) WLR(D) 181, available at <http://cases.iclr.co.uk/Subscr/search.aspx?path=WLR%20Dailies/WLRD%202011/wlrd2013-181> (accessed September 17, 2013).

significance clearly played a part in issue selection, yet there are many issues with similar conservation significance upon which the SSCS does not campaign. The issue has clearly been adopted due to the existence of favourable legal frameworks which make the use of DE possible.

It is difficult to determine whether the campaign to save bluefin tuna has had a measurable effect on the recovery of fish stocks. Continuing concerns amongst biologists seem to suggest that all efforts so far have been insufficient. One of the challenges faced by the bluefin tuna campaign is that there are no easily targeted bottlenecks which would make DE more effective. Unlike the whaling issue, where the Japanese fleet's dependence on one factory ship makes it particularly susceptible to confrontational action, bluefin tuna are caught by thousands of fishing vessels throughout the Mediterranean. What can be said is that the SSCS's DE-based campaign appears more successful than previous advocacy efforts in reducing IUU fishing, and in forcing key players, such as the European Commission, to pay heed.

8.3 - DE and Other Campaigns

While the bluefin tuna case serves to illustrate that DE is not exclusive to the SSCS's anti-whaling campaign, additional investigation is required to determine whether DE is an idiosyncrasy of the SSCS. An examination of other (I)NGO/TAGs reveals that DE is being employed on marine conservation issues by other (I)NGOs, and on land-based conservation issues. This indicates that DE is not exclusively an international phenomenon and that it can be employed in a domestic context. DE is also not exclusive to (I)ENGOS/ETAGs, and has been employed on non-environmental/conservation issues.

8.3.1 - DE and Marine Conservation

The strategy of DE in maritime conservation campaigning is not exclusive to the SSCS. Several smaller conservation organizations, emulating the SSCS model, have recently emerged. The Black Fish (TBF) is a European-based marine conservation group launched by former SSCS crew members. TBF first came to prominence in 2010 when members cut dolphin nets in Taiji,

Japan.⁹²⁴ TBF engages in what it describes as ‘citizen led enforcement.’⁹²⁵ The organization has purchased a RIB and operates several aerial drones (UAVs), which it currently employs in “[p]atrolling areas of the Mediterranean Sea to monitor the illegal use of driftnets and where possible taking action to challenge illegality.”⁹²⁶ Another fledgling organization is the Earthrace Conservation Society, formed by Pete Bethune after a falling out with Watson following the Bethune-*Ady Gil* incident (Chapter 5.3.3.3, above). Thus far, this organization has demonstrated limited activity, and has been primarily involved in monitoring sealing in Namibia.⁹²⁷ Another organization, the Blue Seals, formed by long-time SSCS activist Peter Brown, owns a sea plane and engages in aerial reconnaissance and monitoring, although this organization is “just [the] SSCS in disguise.”⁹²⁸

There are also examples of groups without any ties to the SSCS employing DE. Recent years have witnessed the emergence of a number of local fisher organizations in Mexico created with the purpose of protecting local stocks from overexploitation by outsiders and with the enforcement of local protected areas. The organization Eco-Alianza has helped found the group *Pescadores Vigilantes* (Vigilant Fishermen) in Loreto Mexico, as a response to sporadic official enforcement of fishing regulations and permits which lead to fishing from mainland fleets threatening the Loreto fish stocks and the violation of permit schemes in the Parque Nacional Bahia de Loreto.⁹²⁹ A host of similar organizations have sprung up across Mexico. While most of these organizations work essentially as monitoring groups, as a presence to deter would-be poachers and to report poaching incidents to the authorities, they also confront poachers, and conversations with an official with the Mexican Comisión Nacional de Acuacultura y Pesca (CONAPESCA) suggest that these confrontations may be aggressive and can often lead to

⁹²⁴ See Indymedia UK, “Activists from The Black Fish Cut Nets for Free Dolphins in Japan,” September 29, 2010, available at <http://www.indymedia.org.uk/en/2010/09/463875.html> (accessed May 17, 2012); and discussion in Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁹²⁵ Lecture and conversation with Wietse van der Werf, co-founder of TBF, September 20, 2013, and November 2, 2012, Cambridge, UK.

⁹²⁶ TBF, “Driftnets,” available at <http://www.theblackfish.org/driftnets/> (accessed August 22, 2013).

⁹²⁷ Earth Race Conservation, “Earthrace Reveals Horrors of Namibian Seal Hunt,” available at <http://www.earthraceconservation.org/videos/earthrace-reveals-horror-namibian-seal-hunt> (accessed August 22, 2013).

⁹²⁸ Correspondence with Peter Brown, September 24, 2012. See also The Blue Seals, “About Us,” available at <http://www.blueseals.org/index/aboutus> (accessed August 22, 2013).

⁹²⁹ Eco-Alianza de Loreto, “Our Programs,” available at http://ecoalianzaloreto.org/op_pescadoresvigilantes.html (accessed May 13, 2013); Gary Graham, “Pescadores Vigilantes... Solution to an Old Problem?” WOnews.com, July 2, 2009, available at <https://www.wonews.com/Blog.aspx?id=642&AuthorID=59044&t=PESCADORES-VIGILANTES-Solution-to-an-ol> (accessed May 14, 2013).

violence.⁹³⁰ Another such group is the Mendocino Abalone Watch (MAW) in California, USA, whose stated purpose is “to enhance regulatory enforcement and protection of the abalone resource along the Mendocino Coast.”⁹³¹ Although groups such as MAW focus principally on monitoring, they also confront poachers directly. For example, MAW has been known to make citizen’s arrests of abalone poachers.⁹³² The emergence of groups employing DE independent of any sort of dissemination of strategy linked to the SSCS suggests that this is not required in order for groups to develop DE-based strategies on their own, and that the strategy has been adopted by a number of independent actors. These organizations’ use of DE in domestic settings indicates that the use of DE is not limited to the international setting.

It appears that relying on DE as a principal strategy tends to be favoured by small organizations. This can be attested to the fact the targeted enforcement actions can be much less expensive than widespread awareness raising efforts which must reach millions in order to be effective. This is not to suggest that DE cannot be a component of the strategies used by larger organizations. A case in point is Greenpeace, whose principal strategy is symbolic politics. There are also elements of DE employed by several Greenpeace campaigns both at sea, and on land. For example, in the late 1970s and early 1980s, Greenpeace deployed *Sirius* in an anti-dumping campaign in the Atlantic Ocean. Activists piloted zodiacs under the dumping platforms of the UK registered *Gem* and other vessels, to prevent them from illegally dumping barrels of toxic and radioactive waste.⁹³³ These actions represent a combination of the Greenpeace ‘human shield’ tactic and DE, and indicate that DE does not necessarily rely on aggressive enforcement actions.⁹³⁴

8.3.2 - Conservation DE on Land

While the high seas present an ideal theatre in which to employ DE due to limited jurisdiction and enforcement by states and often overlapping regulatory frameworks, the use of

⁹³⁰ At the Global Marine Protected Areas (MPA) Enforcement Conference, November 25-29, 2012, San Francisco, USA; and see Pescadores Vigilantes in Loreto Mexico, available at http://ecoalianzaloreto.org/op_pescadoresvigilantes.html (accessed May 13, 2013),

⁹³¹ Mendocino Abalone Watch, “About,” <http://www.mendoabwatch.com/about-maw/> (accessed 13-05-2013).

⁹³² Rod Jones, “Abalone Watch Volunteers Assist F&G Wardens,” *The Mendocino Beacon*, May 26, 2011, p. 3.

⁹³³ Zelko 2013: 300; Erwood 2011:16; Plant 2002:113; Plant 1983: 157.

⁹³⁴ Plant 1983:141.

DE is not limited to this theatre. DE has been implemented in coastal waters, as in the case of the Pescadores Vigilantes, and on land, by MAW. Greenpeace has also incorporated DE into some of its land-based campaigns. For example, in 1991, following several months of scientific research and a legal action, which sought to establish that the outflow from a pipe was in violation of the 1989 Water Act, Greenpeace activists temporarily blocked the outflow pipe of the Albright & Wilson plant in Cumbria (UK). Albright & Wilson subsequently sued Greenpeace for £250,000 in lost production and £50,000 in damages. The plaintiffs lost the suit, and not only were all charges against Greenpeace dropped, but the organization was awarded £100,000 in costs.⁹³⁵

8.3.3 - *DE on Other Issues*

The use of DE is evidently not limited to (marine) environmental organizations and campaigns. One salient example of the use of DE is the case of ‘hacktivism’ – vigilantism on the internet. In many ways the internet shares similar legal characteristics with the high seas. Computer hackers (‘hacktivists’) have taken advantage of this to engage in DE online. A prominent example is that of anti-child pornography vigilantes, such as Ethical Hackers Against Pedophilia which engages in “direct vigilantism by hacking into and disabling suspected offenders’ computers, posting anti-pedophile messages on pedophile bulletin boards, and swamping pedophile newsgroups with the aim of closing them down.”⁹³⁶ The hacker group ‘Anonymous’ launched ‘#OpPedoChat’, a campaign which promises “defaces, logs & dox and the occasional domain hijack” of child pornography websites.⁹³⁷ In 2011, the group’s operation ‘#OpDarknet’ claimed responsibility for “taking offline over 40 websites used for sharing

⁹³⁵ Rawcliffe 1998:85-86, see also Business Library, “Greenpeace Wins Pollution Case,” September 16, 1991, available at http://findarticles.com/p/articles/mi_hb5255/is_n18/ai_n28606353/ (accessed April 11, 2012); and see Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁹³⁶ Wortley and Smallbone 2006:46, see also Forbes, “Vigilante Hacker,” available at <http://www.forbes.com/1998/04/17/feat.html> (accessed August 20, 2013).

⁹³⁷ Emil Protalinski, “Anonymous has a New Target: Pedophiles,” *ZD Net*, July 10, 2010, available at <http://www.zdnet.com/anonymous-has-a-new-target-pedophiles-7000000524/> (accessed May 13, 2013).

pedophilia - and for exposing the names and identifying information of more than 1500 alleged pedophiles that had been using the sites.”⁹³⁸

DE has been used on a wide range of issues where activists can make a credible claim to enforce the law. DE can be more readily employed by small relatively resource poor organizations and groups, suggesting that an additional benefit of DE is its cost effectiveness relative to conventional INGO/TAG strategies. Of course, there is also evidence of DE being incorporated into the campaigns of larger organizations, which suggests that its use is not limited to these small resource-poor groups. It seems as though the permissive nature of legal structures such as those governing the high seas and the internet, which are ripe with flagrant non-compliance, also facilitate the use of DE. However, it is evident from the noted examples that DE is not exclusive to use in such theatres and that it can also be implemented in domestic settings. Additional research will undoubtedly reveal more (I)NGOs/TAGs which use DE or incorporate elements of DE into their campaigns.

⁹³⁸ Blue Violet, “Anonymous Attacks child Porn Websites and Publish User Names,” *ZD Net*, October 21, 2011, available at <http://www.zdnet.com/blog/violetblue/anonymous-attacks-child-porn-websites-and-publish-user-names/757> (accessed May 13, 2013); I am thankful to a commentator of a poster of Eilstrup-Sangiovanni and Phelps Bondaroff 2014 at the *International Studies Association Annual Convention* April 1-4, 2012, San Diego, USA, for suggesting this example.

CHAPTER 9 – CONCLUSION

9.1 - Innovation at the Margins

This study was launched with the intent of gaining insight into the strategy of the SSCS and by so doing to expand our understanding of the strategies employed by IENGOS and ETAGs. The SSCS is an organization whose strategy is unlike any described in the INGO/TAG literature. It is a relatively small and resource-poor organization employing an aggressive and confrontational outsider strategy, a strategy which defies classification in Keck and Sikkink's typology of INGO/TAG actions. Existing literature on the role of NSAs in IR suggests that such a strategy can be expected to achieve marginal success, however the SSCS has been successful in achieving its ambitious goals and in compelling states into action. The SSCS has effectively disrupted Japanese whaling and has also leveraged the Australian government into taking steps to enforce the laws within its jurisdiction.

A close examination of the SSCS anti-whaling strategy reveals that the SSCS is engaging in DE – whereby it actively and aggressively seeks to enforce existing marine conservation laws through the use of DA. The organization's confrontational actions serve to effectively force its targets to comply with international laws. Enforcement need not necessarily require confrontation or aggression, however given circumstances, this may be the most effective form of enforcement. Escalating costs to a non-compliant target and physically preventing its illegal actions is an effective way of ensuring compliance.

Engaging in confrontational intervention makes for effective enforcement but it also exposes activists to potential retaliation from targets and from state intervention. DE employs several mechanisms which greatly reduce potential retaliation. Activists are protected by the principle of unclean hands, in as much as targets do not wish to draw attention to their own wrongdoings by indicting activists. If claims of non-compliance are credible, the target is less likely to retaliate. A further deterrent is the tangled web of international laws in which activists surround themselves and their operation, secure in the knowledge that states wish to avoid complications or potentially embarrassing international incidents.

Activists' claims to enforcement also exert considerable leverage on states to enforce their own laws and live up to international obligations. This approach eschews the use of moral in favour of legal leverage. Rather than criticizing states for violating (potentially contested) norms, DE speaks the language of states, not only criticizing their failure to live up to their international commitments and obligations, but through the use of confrontations which cannot be ignored. Appealing to the law and enforcement of the law is powerful. Using the law allows activists to speak a universal language, which can be effective in circumventing moral deadlocks. In speaking directly to states, DE obviates the need to mobilize large segments of the population, and to a considerable degree insulates activists and campaigns from possible backlash of public opinion.

While the SSCS is able to take advantage of the complex legal context specific to the Southern Ocean, a survey of other groups similarly engaged in DE indicates that DE is not limited to use on the high seas. The requirements of DE appear to be that activists must be able to make convincing claims to legal authority, appear and behave as law enforcement, select targets which are violating laws, and protect themselves by entwining their campaigns in law and legalities in general. An examination of the SSCS's use of DE on its bluefin tuna campaign indicates that the strategy may be particularly well suited to issues that otherwise lack characteristics considered favourable to INGO/TAG campaigning. The fact that it can be difficult to identify environmental problems with short causal chains and which involve clear ideas about right and wrong, and that many pressing environmental issues also lack charismatic flagship species which might otherwise compensate for these weaknesses, make DE well suited to environmental issues.⁹³⁹ Effective campaigns employing DE can be extended beyond issues involving bodily harm to vulnerable individuals, legal equality of opportunity, or charismatic fauna. Instead, issues only require existing legal framework upon which enforcement claims can be made in order to serve as the subject of effective INGO/TAG campaigns. In this way, DE is highly versatile, as activists can engage in a form of jurisdictional arbitrage, selecting from a range of international and domestic laws upon which to make their enforcement claims.

⁹³⁹ Keck and Sikkink 1999:98 and 26.

9.2 - Limitations and Challenges of DE

DE is not without limitations and is far from a strategic panacea. While potentially extending the range of issues upon which activists can successfully campaign, DE's reliance on an existing legal framework serves as a limitation of the strategy: because DE can only enforce laws once they are enacted, other conventional INGOs/TAGs strategies are still necessary at earlier stages of the global policy making process; specifically in the agenda setting and negotiation stages. DE is suited to ensuring compliance at the implementation stage.

DE requires that practitioners find a well considered balance between aggression and confrontation while maintaining an image as an enforcement organization. As elaborated upon, the 'practices of legality' which constitute DE can easily appear as 'practices of illegality' should practitioners fail to appear proportionate. This may mean avoiding the use of tactics which might otherwise prove effective. Activists engaging in DE must also expend considerable effort in promoting and maintaining their image. Such efforts influence the types of issues upon which they can campaign, the structure and leadership of the organization, and may further limit the use of other strategies. As is evident in the case of the SSCS's exclusion from IWC meetings, DE may not be compatible with other conventional INGO/TAG strategies.

DE also suffers from an additional constraint, notably target selection and the overall effectiveness of DA. DA, and as a consequence DE, appears most effective against bottlenecks and against private targets. Examination of the SSCS's bluefin tuna campaign reveals that the effectiveness of this campaign suffered for lack of an easily targeted bottleneck. In this case, the SSCS was only able to target a single vessel out of potentially thousands, and while the release of 800 bluefin tuna may be significant to the targeted company, the impact of this action on the industry was minimal, particularly when compared to the organization's impact on Japanese whaling. The 'cost escalation' or 'resource burn' component of DE and DA is more difficult to enact against wealthy targets, particularly states. One of the challenges facing the SSCS in its efforts to 'put the whalers out of business,' is that JARPA and the ICR are subsidized by the state and therefore backed by considerable resources. Additional research may reveal further limitations.

9.3 - An Expanded Role for NSAs in IR

Understanding DE serves to expand our understanding of the role of INGOs and TAGs in IR. This study has demonstrated that there is indeed a larger role for DA in IR, notably as the enforcement mechanism of DE. DE challenges classification in Keck and Sikkink's typology of actions,⁹⁴⁰ whereas this study suggests an expansion of the typology to include the new category of 'enforcement politics.' When the SSCS engages in DE it is actively enforcing compliance, rather than merely documenting and reporting instances of non-compliance. By so doing, the SSCS reaches high into the hierarchy of Florini and Simmons' 'instruments of power' to tools which are generally seen as belonging exclusively to states.⁹⁴¹ The success of the SSCS approach challenges IR scholars who claim that INGOs and TAGs lack any 'real enforcement power,' and instead rely on persuasion.⁹⁴² The strategy is highly coercive and physically alters targets' behaviour.

In employing DE, the SSCS discards the role of protesting supplicant, seeking to persuade, influence and advocate, and assumes an expanded role of an actor who is capable of engaging in aggressive action which has a tangible and significant impact in IR. This is a bold re-imagining of the role of NSAs in IR, one which suggests that individuals can endeavour to uphold international laws when states fail. Importantly, this vision of an expanded role for NSAs in international law is not simply advocated, it is aggressively enacted. When activists move to enforce a specific international law, they not only strengthen practices of legality surrounding that law (and therefore its compliance pull), but they also assert their right to enforce that law. Activists' use of DE also demonstrates that they are not constrained to operate within parameters of actions granted to them by states. Activists assert their right to enforce laws absent of any state sanction. This assertion represents a bold re-interpretation of the role of NSAs in IR.

⁹⁴⁰ Keck and Sikkink 1999:95; and Keck and Sikkink 1998:16.

⁹⁴¹ Florini and Simmons 2000:10.

⁹⁴² Finnemore and Sikkink 1998:900; see also Khagram, Riker and Sikkink 2002:12; Betsill and Corell 2001:73.

9.4 - Practical Implications

This study also sought to contribute to improvement and refinement of IENGO/ETAG strategies. DE is a relatively inexpensive, versatile, and aggressive outsider strategy, which is capable of levelling considerable power in the international arena. A comprehensive analysis of this strategy can refine its application, increase its rate of success, and perhaps foster further ameliorations and innovation. Pressing environmental problems which imperil ecosystems worldwide require urgent action on every possible front, expanding the role of NSAs is particularly valuable in the face of prolonged inaction on the part of states.

Opportunities for the use of DE by INGOs/TAGs most certainly abound. There are hosts of pressing environmental problems which cannot be effectively addressed using conventional INGO/TAG strategies, but which do have laws upon which claims to DE could be based. Issues such as climate change and ecosystem conservation have long causal chains and are difficult to frame simply in terms of right or wrong. Tragedies of the commons such as these too often lack clear easily defined and targeted ‘villains.’ Issues such as the expansion of krill fisheries and ocean acidification present a challenge to conventional INGO/TAG strategies, yet protecting creatures such as molluscs and crustaceans, for instance, is absolutely vital to the stability of marine ecosystems. The use of DE may well be suited to such issues.

DE is attractive to activists because it produces concrete, direct and often immediate results. The question arises as to whether activists can wait for conventional advocacy and awareness raising efforts to have an effect on international policies? Activists may turn to approaches which express the urgency of the situation and which promise more immediate and tangible results.

DE may be preferred on certain issues which would otherwise be amenable to conventional INGO/TAG strategies. Environmental activists can turn to DE as a means of avoiding the use of potentially divisive and backlash-inducing moral claims. Working with groups to facilitate adherence to the law may be a more constructive approach – one conducive to constructing alliances – than accusing such groups of being norm violators. The whaling issue stands as clear evidence as to how DE can also be used to circumvent issues mired in a moral morass.

On the subject of alliance building, DE may serve as a means of engaging stakeholders in conservation. As in the case of the *Pescadores Vigilantes*, locals can assume a prominent role in conservation. In this case, fishers were not driven to enforce local permitting schemes and to protect fish stocks out of conservation concerns, but were motivated as a means of protecting their wellbeing and livelihood. Regardless of the motivations prompting its use, DE serves as a form of active engagement, involving locals in conservation, rather than the often maligned ‘fortress conservation.’⁹⁴³

DE offers the potential of extending the effectiveness of campaigning beyond the conclusion of an international agreement. All too often, hard fought international environmental agreements have lapsed into ‘dead letter’ status once the issue-attention cycles surrounding them wane. Conventional monitoring strategies which rely on ‘naming and shaming’ require ongoing public attention focused on the issue, which in turn makes them less effective as the attention a specific issue receives recedes. It is at this stage that DE, which does not depend on mobilizing public sentiment, can be particularly effective.

DE has distinct appeal for relatively resource poor INGOs/TAGs. The examination of other groups employing DE revealed that many such groups lack the resources necessary to engage in more conventional INGO/TAG strategies.⁹⁴⁴ Widespread awareness campaigns, designed to reach millions are expensive in comparison to targeted enforcement actions which can be carried out on a modest budget.

9.4 - Additional Questions

Findings contained herein lead to the formulation of additional questions. First, does the use of DE limit an INGO’s/TAG’s ability to employ other strategies and is the use of DE complimentary to other strategies? Clearly, monitoring is well paired with DE. While the SSCS’s use of aggressive and confrontational DE may have severely limited its ability to employ insider strategies, it does not preclude their use by other organizations. For example, TBF is attempting to employ its DE in cooperation with states and regulatory authorities.⁹⁴⁵ DE may therefore be

⁹⁴³ See *inter alia* Siurua 2006.

⁹⁴⁴ See also Eilstrup-Sangiovanni and Phelps Bondaroff 2014.

⁹⁴⁵ See *supra* note 925.

effectively coupled with insider strategies involved in policy making. Exploration of other groups engaging in DE will likely shed more light on these questions and is likely to reveal areas for additional research into the effective combination of DE with other strategies.

Another question enquires into which level of law – domestic, international, or potentially other sources – are best suited to DE? Anton suggests that the SSCS may have stronger claims to enforcement if it were to seek to enforce Australian domestic, rather than international, conservation laws.⁹⁴⁶ Anton also draws attention to a limited number of states (he counts 21) which have laws permitting ‘citizen arrest’, which, in so far as the domestic arena is concerned, may constrain the use of DE.⁹⁴⁷ Additional research will be required to ascertain if this is in fact the case, and to identify additional jurisdictions which might prove favourable to the use of DE.

Another pertinent question asks are there other sources of law which may support the use of DE, such as municipal or tribal law? Can activists engage in DE in order to enforce laws of their own pronouncement, or laws originating from sources other than the state or international agreements? Would such actions still maintain the authority and power of DE, or stray into the domain of CD? Additional areas of inquiry involve the potential use of components of DE, such as enforcement imagery and rhetoric, to bolster the effectiveness of campaigns in the absence of definable acts of DE. This generally addresses exploring the power of legal claims compared to other types of claims. The findings of this study broadly support the claim that there is power inherent in actions which seek to enforce the law, and by extension, that evoking the law can strengthen rhetoric and serve as a means to circumvent deadlocks which tend to occur as a result of protracted normative conflicts. A comparison of moral versus legal claims and their relative effectiveness may well prove particularly informative.

Finally, while the single case study of the SSCS served as an excellent means of identifying and elaborating DE strategy, additional studies can increase our understanding of this strategy and carry the promise of further revelations regarding the use of direct enforcement by (I)NGOs/TAGs.

⁹⁴⁶ See Anton 2010a.

⁹⁴⁷ Anton 2010a:6. These include Australia, the United States, the United Kingdom, Germany, France, Brazil, India, Pakistan, Malaysia, Hong Kong, and Mexico.

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APPENDICES

Appendix 1

Appendix 1 has been approved for restriction in the final thesis, but was made available to examiners at the time of the examination.

Appendix 2

Appendix 2 has been approved for restriction in the final thesis, but was made available to examiners at the time of the examination.

Appendix 3

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Appendix 4

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Appendix 5

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Appendix 6

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Appendix 7

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Appendix 8

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